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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are sixteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of thirty-six, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $12.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $3.00 per year, and for three years thereafter $6.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. The dues for all other Sections are $3.00 a year, with the exception of the Section of Taxation, which are $6.00 a year.

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1951 ANNUAL MEETING

New York City, September 17-21, 1951
Headquarters Hotel — Waldorf-Astoria

The Seventy-Fourth Annual Meeting of the American Bar Association will be held in New York City, September 17 to 21, 1951. Further information with respect to the schedule of meetings will be published in forthcoming issues of the *Journal*.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois, and should be accompanied by payment of $5.00 registration fee for each member of the Association for whom reservation is requested. **Be sure to indicate three choices of hotels, and give us your definite date of arrival, as well as probable departure date. (Regret all space at Headquarters Hotel exhausted.)**

More detailed announcement with respect to the making of hotel reservations for members of the Association may be found on the inside front cover of the April issue of the *Journal*.

All unassigned space will be released to the respective New York hotels, by the Association, on August 27, 1951, after which date reservations may be made, by individual members, with hotels directly.

Security for the Professions:

A Plan for More Equitable Tax Treatment

by **Nathaniel L. Goldstein** • Attorney General of the State of New York

■ The high rates of the progressive income tax discriminate against the professional man, Mr. Goldstein declares. He must spend a long period studying and his preparation involves heavy expense; starting later than nonprofessionals, his earnings during the early years of his practice will be low until his reputation is established; his peak earnings will be concentrated in a few years and the heavy surtax during those years will prevent him from saving for security in later life when his earnings begin to decrease. Mr. Goldstein suggests a plan for remedying this situation.

■ Those whose livelihoods are gained from personal practice of the professions have been called "the forgotten men of taxes".[1] The phrase is a just one save that it does not reveal the whole depth of the problem. Not only do professional men bear the brunt of the inherent inequalities in our tax system with respect to earned income but they in particular are at a disadvantage in providing security for themselves and their dependents when the productive years are over or when they reach the age at which others have been able to accumulate savings or retirement rights and benefits.

The factors responsible for the basic tax inequity in the case of the professional practitioner have been frequently considered heretofore and many palliatives have been proposed. In the article whence came the characterization of professionals as "the forgotten men of taxes"[2] it was pointed out that they are not allowed the choice of incorporation as are businessmen generally. It was shown how, by operating under the corporate form, the total of corporate and individual income taxes can be materially reduced below the straight individual tax on the same net income. But, said Mr. Wolder, "consider the lawyer, the doctor, the dentist and accountant", not allowed by state law to incorporate. Their income is entirely earned income and cannot be split between a corporation and themselves as individuals. It is all taxable at the high individual rates. His solution was to propose legislation whereby such professional men might elect to have their earnings taxed on the same basis as "if the business of said person were a corporation".

The basic inequity is, however, more pervading than lack of opportunity to incorporate. Harry Silverson has given a thorough analysis of what he calls "the deeply ingrained nature of the discrimination affecting earned income" in advocating a plan offering one of the most practical and talked of approaches yet suggested to the situation and now generally known as the Silverson Plan.[3] While it is generally agreed that the taxing system should be basically founded on "ability to pay", its present operation demonstrably bears more heavily on those whose income is directly earned from the rendition of their own services.

Annual Accounting System Is Chief Factor in Situation

The chief factor in this unequal situation is the annual accounting system whereby the measurement of taxable income is by reference to "arbitrary twelve-month cubicles".[4] As Silverson points out, if full sway were given to the ideal of "ability to pay" it would require a lifetime accounting or at least some sort of adjustment to reflect a moving average. More recently the adverse effect of computing income by yearly periods, unrelated to other years, upon those who receive irregular income has resulted in a proposal that a progressive average system be adopted.[5] The effect of annual accounting is to permit deduction of expenses attributable only to the final year against the compensation for long years of work when it is received within one taxable year, and compensation representing years

1. Wolder, "The Forgotten Men of Taxes", 24 *Taxes* 970 (October, 1946).
2. *Ibid.*
3. Silverson, "Earned Income and Ability To Pay", 3 *Tax L. Rev.* 299 (February-March, 1948).
4. *Ibid.* at 301.
5. Bravman, "Equalization of Tax on All Individuals with the Same Aggregate Income over Same Number of Years", 50 *Col. L. Rev.* 1 (January, 1950).

of work is often bunched in a single year, being thus subjected to high surtax rates. The result is that persons with fluctuating income "pay substantially more federal income tax than those who receive an equal aggregate income ratably during the same period".[6] While Internal Revenue Code Section 107 (a) offers some relief where at least 80 per cent of the total compensation for personal services performed over thirty-six months or more is received or accrued in one taxable year by limiting the tax to the aggregate of the taxes had it been ratably included in gross income over the preceding part of the period, this is, as Mr. Bravman calls it, only a piecemeal attack upon the general problem.[7]

Basic Inequity Is Characteristic of Lawyer's Whole Earning Period

But the difficulty is not confined to occasional heavier impact of surtaxes arising from the circumstances of particular retainers. It is a basic inequity characteristic of the whole earning period of the professional man. Silverson gives a comparison of the taxes imposed upon the same lifetime net income over the same period in the cases of a lawyer and his friend whose income is from a trust fund of which he is the beneficiary. There is a heavy differential in favor of the latter whose income is evenly distributed over the years from the time he was 21. The lawyer on the other hand, has little or no income until he is 25. His income is small until he is 30, increases until it reaches a peak between 40 and 55, and then decreases in his later years.[8] This course of earnings is characteristic of the learned professions generally. Because there is a necessary period of schooling and preparation, of low earnings while a practice is established, a concentration of peak earnings and a tapering off, the application of high surtax rates to annual accounting periods is "productive of results which are arbitrary and foreign to any reasonable measure of 'ability to pay' ".[9]

The significant fact is that those who have concerned themselves with the problem of discrimination against the earned income taxpayer and have sought measures to meet it have uniformly selected the professional man as the primary example of the inequity. It is he who illustrates their most telling comparisons. Only the professions are characterized by the long period of study and preparation involving heavy expense before even the privilege of seeking a livelihood therein is gained. Since advertising is generally prohibited and success comes only with the establishment of a personal reputation, there is necessarily a period when earnings will be low. Even in the case of the most successful practitioners peak earnings will not come until comparatively late in their careers and will be concentrated in a comparatively short period. As age comes on activity will normally slacken and income likewise. The very nature of a professional man's services as involving personal trust and confidence means that it is not possible to derive income apart from continued practice.

The professional practitioner is not able to capitalize his considerable investment in his education or his stock of experience and skill. He may not take deductions for depreciation and obsolescence. His income is all earned and subject to the crushing weight of high surtaxes in the short period when his long years of effort come to fruition. The result is wholly disproportionate to the tax resulting from a levelled receipt of the same income over the same years or to any fairly conceived criterion of "ability to pay".

The real tragedy lies not in the merely moral inequity of the heavier taxation to which professional practitioners are inevitably subjected. It is in the impossibility of providing for security at a time when other men are able to retire with some assurance of maintaining their living standards. Again to quote Silverson, the impact of high surtaxes during peak productive years make it "wellnigh impossible for the average professional or other taxpayers deriving income from personal services to indulge in the luxury of retiring".[10]

Silverson Plan Allows Lawyer To Set Up Own Security Fund

The Silverson Plan proposes a method of projecting some portion of earned income to a later period and thus permitting it to be averaged out so as not to bear so unequal a tax burden. This is to be done by permitting "every taxpayer to form what amounts to his own individual pension or security fund".[11] He is to be permitted to take a percentage of his earned net income up to a maximum of 15 per cent or $10,000 in any one year, whichever is less, and invest it in special, low interest-bearing nonassignable United States Government bonds. The amount would be excluded from gross income in the year so invested. Upon redemption of the bonds in a later year, the proceeds would then be included as taxable income. The bonds would be redeemable at any time and mature no later than ten years after the taxpayer's death. Mr. Silverson himself refers to the disagreement of the Taxation Committee of The Association of the Bar of the City of New York with the redemption provisions and its proposal that the bonds be not redeemable until the taxpayer has attained age 60 or until the expiration of ten years, whichever is earlier. Silverson does not regard the investment in government bonds as essential to accomplish his purpose but as an administrative necessity to insure the payment of the deferred tax. While aware of the use of the bonds for providing personal pension funds, he calls the savings feature an "administrative means", not the "substantive end".[12]

It will be seen that the Silverson Plan would be open to all earned-income taxpayers, including salary and wage earners and business pro-

6. *Ibid.* at 1-3.
7. *Ibid.* at 4.
8. Silverson, *op. cit.* at 301.
9. *Ibid.* at 312.
10. *Ibid.* at 307.
11. *Ibid.* at 315.
12. *Ibid.* at 318.

prietors. The proposal about to be made, conceding its inspiration to the Silverson Plan, would limit it to those personally practicing professions not open to corporations, and modify it so as to emphasize its use as a means of securing the future. The tax inequities which have been discussed relate solely to the treatment of earned income but more particularly they inhere in and are peculiar to incomes, typified by professional earnings, which rise sharply to a peak over the course of the years and then fall off. In the case of those earnings which follow a more level course over the years, there is little inequity to correct, as Silverson himself points out, in discussing the deficiencies of the now-repealed earned-income credit. [13]

In the case of the great majority of salary and wage earners there may be a gradual rise in income during their productive life but it will not be characterized by any such sharp rise and fall as to bring the surtax rates into play with grossly inequitable results. Earning power begins earlier and remains more nearly level. Beyond this, however, wage earners have the benefit of social security payments, when they reach retirement age, based upon earnings. Public employees not within social security coverage are generally the beneficiaries of pension plans including contributions by the employer and furnishing substantially adequate retirement allowances. Private employees are also to an increasing degree receiving the benefit of annuities furnished by their employers or pension trusts encouraged by the Internal Revenue Code. The number of plans submitted to the Bureau of Internal Revenue for ruling as to their qualification under Section 165 (a) greatly increased after the beginning of the last war and is constantly growing. [14] The statute gives valuable incentives to the establishment of qualified employee pension plans, and by permitting compensation for employees to be set aside without being then subject to income tax, higher surtaxes are escaped. When it is taxed after retirement an averaging has been achieved not yet matched elsewhere in the tax law. [15]

Professional Man Alone Is Truly Forgotten by Tax Laws

Salaried employees are in a position to receive substantial pension benefits under favorable tax law provisions. Through the more enlightened self-interest of employers generally and the efforts of employee organizations, these benefits, added to existing social security payments, are certain to become more widespread. The tax advantages of those who can operate under corporate form or whose businesses involve the use of capital have been fully treated by the writers who have concerned themselves with the earned income discrimination. Even the proprietor of the nonprofessional personal service business is less likely to be in a position where he is subject to the effect of surtaxes upon a sharply curving graph of earnings and is better able to capitalize upon his business in order to secure his retirement. It is the professional practitioner alone who is truly forgotten by the tax laws and who stands in a position completely exposed to the destructive effect of high and yet to be higher surtaxes upon his ability to secure his old age.

The proposal, therefore, is that the law particularly permit those who earn their income by personal practice of the professions to project a limited portion of their earnings to the future so that they may escape the full impact of the surtax on peak earnings and enable them thus to establish a secured fund for retirement. This would be accomplished by an extremely simple and easily administered plan requiring investment in special government bonds and deferring the tax upon the amount thus invested until redemption of the bonds. The basic features of such a plan would be these:

(1) Allow the taxpayer to exclude from gross income in any taxable year prior to attaining age 65 an amount invested in special United States Government bonds.

(2) Limit the amount which may be so invested in any one year to $10,000 or 15% of earned net income in the practice of his profession, whichever is less.

(3) Provide that the bonds shall be nonnegotiable, nonassignable and shall not bear interest.

(4) Permit the bonds to be redeemed only upon attainment of age 65 and at any time during the life of the taxpayer thereafter or at death.

(5) In the event of death, either before or after age 65, permit the bonds to be redeemed by the estate within a period limited to 5 years.

(6) Require inclusion of the proceeds of the bonds in the gross income of the taxpayer or of his estate, as the case may be when redeemed, and exclude such bonds unredeemed at death from the estate tax.

Such a plan would seem to present few administrative difficulties and would insure collection of the tax upon the deferred income. It would permit the professional earned-income taxpayer to avoid the unfairly

Greystone Studio

Nathaniel L. Goldstein was elected Attorney General of New York in 1942 and was re-elected in 1946 and 1950. He holds the degrees of B.C.S. from New York University and LL.B. from New York Law School, and honorary degrees of Doctor of Laws from Syracuse University and Hobart and William Smith Colleges; he is a C.P.A. in the State of New York.

13. *Ibid.* at 312.
14. Cann, "How the Commission Handles Pension Plans", 23 *Taxes* 918 (October, 1945).
15. *Ibid.*

onerous effect of high surtaxes upon him by a method which will automatically average out his income within limitations effectuating the primary purpose of enabling professional men to achieve the measure of security now denied or the impact of such surtaxes. Administrative cost should be small and no interest burden will be placed upon the Treasury. The only loss of revenue will be that arising from the difference between the high surtaxes upon the limited income which may be thus deferred and the tax upon the net income at the time the savings are drawn down and during the period of deferment of tax the Government will have the use of the monies without cost.

Lawyers have always played a large part in the making and administration of our laws. They have frequently been taxed as a class with the real or fancied shortcomings of the law. It speaks well for the disinterestedness of their use of such influence as they exert in that field that the professional class of which they form a part is admittedly subject to an unequal burden of taxation under existing tax laws. It does not seem amiss that as a class they should seek to alleviate a condition which makes them and their professional brethren the particular victims of insecurity when earning power ceases. Apart from the merits of the Silverson Plan in its general application, it is here suggested that its adaptation to the particular and pressing needs of the professional group is an immediate and justifiable concern of every lawyer.

A Resolution for the American People

■ Disturbed by trends in national and international affairs as well as by a general apathetic attitude toward traditional standards of citizenship, W. B. Bates, President of the Houston Chamber of Commerce, not long ago asked David A. Simmons to serve on a committee to draft a resolution which might be adopted as a statement of policy by the Houston Chamber of Commerce.

Not waiting for the committee to be formed, Mr. Simmons drafted the following resolution which he suggested "for adoption by the people of America" and delivered it to Mr. Bates. While returning to his home not many hours later, Mr. Simmons suffered a stroke which claimed his life the next morning. His final statement on a subject that had long been close to his heart follows:

If the principles of this great democratic republic are based on Christianity—as they are; if freedom is preferable to slavery—as it must be; if our leaders—local, state, and national—are the servants of the people and not their masters; then the people are entitled to demand of them honesty in their personal conduct; loyalty to the people and to the principles of decency and constitutional government; faithfulness to their trust—not mere absence of illegality in their conduct of governmental affairs; and, above all, an example of competence in the handling of our affairs, domestic and foreign, and frugality in the handling of the people's money, so as to inspire the people to be competent and frugal in the handling of their own.

The responsibility of leaders is to furnish leadership. Our so-called Asiatic "policy" of indecision and confusion is being paid for in blood in Korea and tears at home; and we, in our pain, engaged in "Operation Killer", are wreaking a bloody vengeance on little people who have had the misfortune to fall victims of a criminal leadership which has forced them into slavery. Where is the voice of a Woodrow Wilson to proclaim the principles of right and justice to oppressed peoples and to arouse them to throw off their yoke?

Has America fallen so low in the esteem of mankind that no one can hear what we say about ideals and principles for seeing the way we act about them here? The concept that we have to buy friends to keep them from siding with Russia is a concept from the lowest stratum of "practical politics". Our opulence earns the envy of the nations to whom we throw large sums of money; the hatred of those to whom we do not; and, inevitably, the denunciation of the beneficiaries when we stop.

Jefferson's "equal rights for all; special privilege for none" has been thrown out the window. "Special privileges for all" gets more votes.

We are sick unto death of the scrambling for power of little men in high office; of the influence peddlers; of the traitors and fellow travelers; of whitewashing of friend and Party; of the appointment to office of men without merit but with pull; of gamblers and crooks, politicians and fixers. The stench rises as high as an atom bomb's smoke. What we need is Men—men who are worthy of

the offices they fill, —
the country they serve, —
the boys who fight and die on the bloody field of 'police action', —
the principles to which we pay lip service —
our forefathers, —those unknown men who became great by their dreams and hopes for a great people, a great country, a great world.

For men are not born great. They are born with a capacity to become great. If, in periods of emergency, their every decision is selfless and each vote they cast is for the good of our Country, they will be good men and great patriots.

A people become great by following great leadership.

A world will become great by following a great nation.

The time is NOW.

What are we waiting for?

All we need is for men, big or little, to make selfless decisions, and to vote always: "For the Good of our Country", whether it leaves one in or out of office, or makes one rich or poor.

In this great emergency, we beg every one in office or out of office to adopt this Resolution.

A Few Observations:

The Communist Manifesto in America

by **Homer D. Crotty** • of the California Bar (Los Angeles)

■ Mr. Crotty's thesis is that the great danger to our society today is not the violent internal revolution advocated by the Third International, but the slow, insidious "reforms" that were the goal of the Second International. A little over a century after the publication of the Communist Manifesto, only fifty years since the death of Queen Victoria, he writes, the Western world has gone far along the route charted by Marx in 1848. In this article, taken from a speech delivered as President of the State Bar of California, Mr. Crotty discusses the three means by which he says we are being led into socialism.

■ I should like to analyze a few of the tendencies which affect the lives as well as the practices of lawyers today and which, if unchecked, may prove disastrous to the profession. So that we may have a proper perspective, let me make a few comparisons. It was just fifty years ago in January of 1901 when Queen Victoria died. The age of Victoria has been looked at from various points of view. Some feel it to be a bit comical, others a hopelessly reactionary period, and still others look back at it as the age in which a few people enjoyed a very good life with its attendant magnificence, a high standard which will never be seen again. There was then an air of stability which seems totally lacking in this age of security-seekers. It is difficult now to understand why Gladstone, a few years before Victoria died, remarked that he had presided over a revolution. That great liberal, it is submitted, would be utterly bewildered today. The Victorian Age represented an ordered society in which most people thoroughly believed. Everywhere there was an increasing prosperity, a confidence in the age and in the future. No feeling of danger in the acceptance of new ideas disturbed anyone. The idea of progress was accepted without question. There was, moreover, profound belief in the value of our Western civilization, in its free democratic institutions, its humanitarianism and its obedience to law. There was no doubt that all was right with the world and, if a few flaws were pointed out by the critics, those were merely squeaks in the machinery which could be oiled and eliminated.

What has happened to this confidence in an ordered society? Today we have seen the most unbelievable progress in the sciences, both pure and applied. The advances in medicine alone would have been considered, by the Victorians, as fantastic. The rapidity of communication and travel are breathtaking. The advances in the weapons of war have been appalling. But now we talk more about the collapse of civilization than of its continued upward progress. We await with increasing anxiety the advent of chaos. In the interim between Victoria's age and ours have occurred the two most destructive wars in history with their concomitant ills. There have been the most outrageous cruelties inflicted upon human beings since the Middle Ages and before. Tremendous masses of people have been murdered or moved from their ancestral homes for no better reason than the whim of a despot or from motives of revenge. Propaganda has developed to the ultimate in mendacity. Our conception of an ordered society has broken down. In the international field we see all nations preparing for another war (if they are not already engaged), more cataclysmic in its horrors than anything heretofore imagined. There is a profound fear and unrest in the world. The quest for security has never been greater and to attain it many things will be sacrificed. Sometimes I wonder whether in this quest for security and in the willingness to make sacrifices to get it we should not recall that the chained watchdog is the most vociferous guardian of his miserable status.

Are We Approaching the Garrison State?

What I should like to pursue are some of the ideas that were held by

an insignificant minority in the Victorian era and that today are so pervasive and so strong. The effect of these ideas upon the legal profession has been profound. These ideas, I submit, have had more than a little to do with the breakdown of an ordered society. Regardless of whether or not we are at war, these ideas have exercised their corroding influences. As we go into this coming difficult era, known as the garrison state, let us hope their progress can be arrested.

I shall discuss them in the following order:

First — Private property in land should be abolished.

Second — A heavy progressive or graduated income tax should be imposed.

Third — Inheritance should be abolished.

These three ideas are taken from the Communist Manifesto of 1848, and their influence has been worldwide.

The proponents of them were originally the Socialists. In Europe, before the Hitler regime, they were adopted by the Social Democrats and later by the Nazis. In England they are the principles of the Labour Party, and in America of the Socialist Party, and I think it will be seen as I go on that a considerable number of Democrats as well as Republicans adhere to some of their offshoots.

The first idea — private property in land should be abolished — at first blush seems to be a very remote prospect in this country, but is it really remote? Let us see how that idea has spread. In those countries in which the views of the Second International predominate, the course is gradual and insidious nationalization. The great industries of transportation and communication are the favorite first targets, then come coal, steel, gas, electricity, banking and then all means of production and distribution, and finally the retail outlets and the land itself. Where the Bolsheviks gained control, the take-over was drastic and catastrophic. All real property and most forms of personal property were seized by the state without compensation. The frightful suffering caused by the economic upheaval which followed was considered merely an incident to the liquidation process. Latterly the Soviets permit ownership of personal property and a few forms of real estate holdings. When it comes to the socialization of property, you can take your choice — the slow and creeping methods of the Socialist International or the violence of the Red International.

Plans of Labour Party Call for Abolition of Private Property

Perhaps we might hear that this widespread seizure never would happen in England, but to answer this, listen to the plans of the Labour Party. In 1948, to mark the centenary of the first publication of the Communist Manifesto in 1848, the Labour Party of Great Britain issued a special edition in English of that important cornerstone of both Internationals. Among other things cited to show the achievement of certain aims of the Manifesto, the Labour Party, in a foreword to the Manifesto, stated:

> Abolition of private property in land has long been a demand of the Labour Movement. A heavy progressive income tax is being enforced by the present Labour Government as a means of achieving social justice. We have gone far towards the abolition of the right of inheritance by our heavy death duties. [Communist Manifesto Socialist Landmark, page 7, London (1948)].

Not even a notable deficit is a deterrent to nationalization. Witness the British coal industry. Only a few years ago England exported coal. It is true that not all mines then made a profit. But what do we see today?—the entire industry operated at a loss and the country importing coal. The end is not yet. We seem to be strangely influenced by our English models. So I suggest that the further drift to socialization be fought at every step. If it is to continue, the legal profession can expect to become employees of the state. Where the state owns the industry, who but government-employed lawyers advise that industry? When there is but one buyer or one seller of a commodity for the entire nation, as in Soviet Russia, it is submitted that the field of commercial practice will be limited.

There may be some comfort to be found in the change of position in some few respects in the Soviet Union with regard to limited ownership of private property. Evidently the Kremlin discovered that with all incentive gone, an equality of misery did not work and that some incentive must be provided. Thus we have the Stakhonovites, who get exceptional rewards for exceptional work. On the other hand, there is Siberia awaiting the sluggard or the disobedient. Capitalism still provides the incentives, although these are being whittled unmercifully by the income tax. But we do not have any convenient Siberia to which to send the recalcitrants.

Income Tax Is Means for Abolishing Wealth

The second idea which was absorbed by the democracies from the Communist Manifesto with the greatest fervor is the imposition of a heavy progressive or graduated income tax. The theory behind this point of the Manifesto was that through this means social justice would be achieved. Using simple English, this means the elimination of the wealthy and middle class through this brutally effective device. You will note the reference above to the program of the Labour Party in Great Britain that the heavy progressive income tax there is being enforced by the Labour Government as a means of achieving social justice. When our federal income tax was first adopted in 1913, the maximum rate was 7 per cent on the net income. Today the rate in the topmost bracket has gone to 91 per cent. In England, with certain refinements—that is, the elimination of capital gains and gambling winnings—the rate has gone to the point where a total net income after taxes, is limited to approximately $24,000 in our money. Through the use of a special tax in 1948 it was possible for the Govern-

ment to take more than 100 per cent of certain incomes. In this range the rates ran up to 125 per cent of the income and involved naturally the use of certain capital to pay the "income tax". In the case of a trust for Lady Mountbatten, an act of Parliament was necessary to permit the trustees to use part of their trust corpus to pay the income tax for that year.

No political party, except perhaps the Communists, has been so frank as has the Labour Government in England to denominate the progressive income tax as a means of eliminating the wealthy and well-to-do, but it can no longer be doubted that these trends are firmly on the march in this country. It can be confidently prophesied, unless the people take a stand, that the same maximum income limitation will be enforced here as in England. Barefaced confiscation of income would be resented violently, but the achievement of the same purpose by a progressive income tax is deemed eminently respectable and politically desirable. For example, it was calculated under wartime rates that for a person to leave an estate of $100,000, representing twenty years' accumulations, he would have to have annual net earnings, without counting any living expenses, of $32,000 a year. To leave an estate of $1,000,000, representing income accumulations over the same twenty-year period, he would have to have a net income of $1,075,000 per annum, and spend nothing that is not deductible. The result of this progressive income tax has made it almost impossible for lawyers any longer to leave much of an estate, except possibly through the medium of life insurance. The same thing is true of their clients, who will face the same difficulty of accumulation through income. Capital gains appear to be the only way out. Corporate earnings have not been treated so ruthlessly, on the theory that the goose that lays the golden egg should not be crippled. Here again I feel that a very important incentive in American life is being eliminated by following this doctrine of the Communist Manifesto and a firm stand should be taken against further increases in income taxes.

Burdens of War Should Not Rest on Wealthy and Middle Classes Unduly

It is true that great sacrifices are demanded and should be cheerfully given for our country at war, but it is submitted that the burden of these sacrifices should not rest unduly on either the wealthy or the middle classes. A retail sales tax would produce far more income than the income tax. Canada has a retail sales tax of 8 per cent. Peter Drucker has suggested a consumption tax of 20 per cent. It has been stated recently that if all incomes in excess of $100,000 were taxed 100 per cent, the amount raised would be not more than $900,000,000. On the other hand, if all incomes of over $25,000 were taxed 100 per cent, the tax would raise approximately $5,500,000,000—perhaps only a down payment on our war program. If Congress really wants to control inflation it can be done by taxation, but not solely by taxation on incomes. The elimination of incentives because of the tax rate would have important adverse effects on American life.

The third idea—that inheritance should be abolished—was put into effect in Soviet Russia soon after the Bolsheviks seized power. Elsewhere in the world, it has taken the more socially acceptable form of inheritance taxes. Let us examine this point in detail. Were it to be advocated that in the United States or in any state all inheritance of property should be abolished, the outcry against such a doctrine would be earsplitting. Yet when a procedure to accomplish essentially the same purpose is dressed up in the form of inheritance taxation, there is almost universal acceptance of the principle and practically no sound of protest. Perhaps it seems pleasant that this route of expropriation is reserved for the wealthy. There are, after all, only a few who are wealthy.

The tax is introduced at a nominal rate. In 1916 the top federal rate was 10 per cent. Time after time the rates have been advanced, and now the effect is felt not only by the wealthy but by the middle class as well. Today the top bracket has 77 per cent carved from it (exclusive of credits). Nearly everyone expects the advances to continue.

Curtis Studios

Homer D. Crotty received his A.B. in 1920 and his J.D. in 1922 from the University of California, and his LL.M. in 1923 from Harvard University. He is president of the State Bar of California and is a member of a Los Angeles law firm. He was a former member and chairman of the Committee of Bar Examiners of the California State Bar.

The amount of taxes raised by the estate and inheritance taxes is not large. Indeed the whole amount produced by the federal estate tax, it has been estimated, is about the same as the amount disbursed for the potato growers' subsidy (172 *Commercial & Financial Chronicle*, #4968, Mayo Adams Shattuck, pages 1, 34 *ff.*). It is altogether clear that the purpose of inheritance, estate and gift taxes is principally social reform and only incidentally revenue raising. Our people have decided apparently to eliminate the man of wealth. There are still quite a few wealthy dinosaurs above ground, whose demise the tax gatherers eagerly await.

Question Now Seems To Be, Is the Middle Class To Go?

There is for all practical purposes

no retreat in this march, for the people appear convinced of its righteousness. But the question remains, not whether substantial estates are to be all but confiscated, but whether the social reformers, regardless of party, are to extend their activities to eliminate the middle class. Should not the line be held at not greater than the rates provided in the present laws? If not, then please ask yourselves, how far will our lawmakers go? Will they carry out the mandate of the Communist Manifesto—that inheritance shall be abolished by the more acceptable but equally effective method of taxation? If it is abolished, may we not assume that probate of estates will be a truly ministerial function, to be handled solely by the tax bureaus?

It is interesting to note that the realists in the Kremlin have retreated. They followed literally the Communist Manifesto and abolished all inheritances in 1918. But this law was abrogated four years later by a new law which permitted inheritances up to 10,000 rubles for each estate. Three years later, the 10,000 ruble limit was removed and now no limit is imposed.

The Russian inheritance tax formerly ran up to 90 per cent. In 1943, the tax was abolished and now only a filing fee is charged, running to a maximum of 10 per cent on the largest estates. (*Social Meaning of Legal Concepts*—c. 1: "Inheritance of Property and the Power of Testamentary Disposition", pages 3, 4.) What the values of individual estates are now in the Soviet Union, I do not know. In 1943 the London *Economist* reported several 1,000,000 ruble contributions to the Russian war relief from farmers. So we must assume there are a number of substantial holdings.

The three ideas which I have mentioned above, are particular instances where the creeping paralysis of the Socialist International is affecting our society in general and our legal profession in particular.

I sincerely believe that the American people are thoroughly aroused over the dangers from the Third International, and that a violent overthrow of our Government is inconceivable. But why are they so complacent about the aims of the Second International, the aims of which accomplish the purposes of the Red International, not by revolution, but by the insidious routes of nationalization and taxation? Is confiscation unrecognizable when it happens gradually? May I ask what room there will be for lawyers if the nationalization process is complete, if the Government becomes the only buyer or the sole seller, if incomes and estates are reduced to the vanishing point, except a position as a government employee?

Perhaps the fulfillment of these ideas may seem remote at this time. If so, please compare the situation in England and in the United States between 1950 and 1940. Then make a comparison with 1930, and each preceding decade back to 1900, and you will be startled by the progress.

I submit that the burden of supporting our war program should be distributed equitably and not used as a means of accelerating social reform. Other effective revenue producing means can be devised.

It is hoped that the lawyers will protest vigorously the persistent advance both on state and national levels to hold off further encroachments of the ideas of the Socialist International. We should object strenuously to a philosophy that will reduce us to an equality of misery.

If we take no steps to hold the line, you may be sure that the profession will be swirled about like leaves in a storm and with about the same fate.

In conclusion, may I urge upon you an increased interest and activity in public affairs. Nothing is more important in our daily lives. We should give these matters the same attention we give to the interests of our clients. If we do not, we may be sure progress in these three ideas will be progressively overwhelming. If we retire to our corners in dudgeon, we can only expect a more rapid progress in their fulfillment. Let the law makers know your views. That, at least, will be a start in holding the line. We cannot afford to be apathetic.

NOTICE OF ANNUAL MEETING OF MEMBERS OF AMERICAN BAR ASSOCIATION ENDOWMENT

■ The annual meeting of members of the American Bar Association Endowment will be held during the week of the Annual Meeting of the American Bar Association, September 17-21, 1951, at The Waldorf-Astoria, New York City, for the election of two members of the Board of Directors for the term of five (5) years and for the transaction of such other business as may come before the meeting.

All members of the American Bar Association are members of the Endowment.

Freedom of the Press:

Is It Threatened in the United Nations?

by Elisha Hanson • of the District of Columbia Bar

■ In this article, Mr. Hanson declares that such things as the recent murder of Argentina's great newspaper *La Prensa* by Dictator Peron can happen in the United States if the draft Covenant on Human Rights and the United Nations' draft Treaty on Freedom of Information are ratified by the United States.

■ If there be any citizen of the United States who is still of the opinion that what recently happened in Argentina cannot happen here, he should give immediate and earnest consideration to the provisions of Articles 2, 13, 14, 15 and 16 of the draft of the Covenant on Human Rights now pending before the General Assembly of the United Nations, to the report of the representatives of fifteen nations comprising a Special Committee to draft a covenant on freedom of information and to Articles 55 and 56 of the Charter of the United Nations.

Articles 13, 14, 15 and 16 of the Covenant, and Article 55 of the Charter, contain unctuous platitudes in respect of individual liberty, higher standards of living and so-called fundamental freedoms. Yet these articles, when considered in connection with Article 2 of the Covenant and Article 56 of the Charter, demonstrate that if the Covenant ever becomes a treaty of the United States then the way is opened to destroy individual liberty in this country.[1]

The bulwark of the American citizen's individual liberty is the First Amendment to the Constitution of the United States reading:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

1. *Article 55 of the Charter:*
With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 of the Charter: All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Article 2 of the Covenant:

1. In the case of a state of emergency officially proclaimed by the authorities or in the case of public disaster, a State may take measures derogating, to the extent strictly limited by the exigencies of the situation, from its obligations under Article 1, paragraph 1, and Part II of this Covenant.

2. No derogation from Articles 3, 4, 5 (paragraphs 1 and 2) 7, 11, 12, and 13 may be made under this provision. No derogation which is otherwise incompatible with international law may be made by a State under this provision.

3. Any State party hereto availing itself of the right of derogation shall inform immediately the other States parties to the Covenant, through the intermediary of the Secretary-General, of the provisions from which it has derogated and the date on which it has terminated such derogation.

Article 13 of the Covenant:

1. Every one shall have the right to freedom of thought, conscience and religion; this right shall include freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are pursuant to law and are reasonable and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 14 of the Covenant:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The right to seek, receive and impart information and ideas carries with it special duties and responsibilities and may therefore be subject to certain penalties, liabilities, and restrictions, but these shall be such only as are provided by law and are necessary for the protection of national security, public order, safety, health or morals, or of the rights, freedoms or reputations of others.

Article 15 of the Covenant:
The right of peaceful assembly shall be recognized. No restriction shall be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary to ensure national security, public order, the protection of health or morals or the protection of the rights and freedoms of others.

Article 16 of the Covenant:

1. The right of association shall be recognized.

2. No restrictions shall be placed on the exercise of this right other than those prescribed by law and which are necessary to ensure national security, public order, the protection of health or morals or the protection of the rights and freedoms of others.

3. Nothing in this article shall authorize States parties to the Freedom of Association and Protection of the Right to Organize Convention, to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

It may be old-fashioned to refer to the writings of some of our Founding Fathers, nevertheless it is important to recall that Thomas Jefferson in 1786, writing to a friend from Paris, said:

> Our liberty depends upon the freedom of the press and that cannot be limited without being lost.

Jefferson recognized that without a press free from restraint from any hostile source, whatever the source may be, to gather and disseminate information, to inform public opinion, and, when necessary, to arouse public indignation against abuses of power, there can be no liberty.

Five days before the proclamation of the Declaration of Independence, Jefferson's own State of Virginia, having decided to throw off the foreign yoke, adopted a constitution wherein it said:

> Freedom of the press is the great bulwark of liberty. None but a despotic government would attempt to restrain it. If it be restrained all liberty fails.

During the period between the surrender of Cornwallis at Yorktown and the ratification of our Federal Constitution, our forefathers fought out the issue as to whether or not individual liberty should be guaranteed for all time in the fundamental law of the land. The conflict was not resolved until the sponsors of the Constitution agreed to submit to the first Congress to be called thereunder a series of amendments since known as the Bill of Rights so that those liberties for which the war with the mother country had been waged could be preserved. Just as the State of Virginia had said in 1776 that freedom of the press is the great bulwark of liberty so our forefathers said when they ratified the First Amendment wherein they sought to prohibit the restraint of the press by government in order that it might serve as the protector of all the other liberties.

Now just what is freedom of the press?

It is the right of the people to have a press free from restraint by government in the performance of its function of gathering and discussing and disseminating information of public importance.

Publishers Are Only Trustees of Right of Free Press

I emphasize; it is a right of the citizens generally, not a special privilege accorded those engaged in the business of publication. Publishers are but trustees of this right and just as other trustees are obligated to maintain their trust, so are publishers obligated to oppose every form of restraint that is proposed, by whatever source in government, to restrict your right to be informed.

The obligation is accompanied by a great responsibility attached to which are severe penalties for its violation. Freedom from prior restraint is accompanied by liability to subsequent punishment attaching to any member of the press who abuses its trust.

It is this difference between the doctrine of prior restraint imposed by so many other nations and the American doctrine of freedom from prior restraint by government that makes it possible for the American people to be better informed than the citizens of any other country in the world today.[2]

Let me digress a moment to speak of the function of the press.

It has but a single function and that is to gather and disseminate information. The information in turn falls into three classes: news, editorial comment and advertising.

News is information about matters of general interest which in the editor's opinion is of sufficient importance to his readers to justify its publication.

Editorial comment is discussion of the news and criticism, constructive or destructive, of the acts and activities of those who appear in the news.

Advertising is information concerning the goods, services or ideas of one who pays to have such information disseminated.

Information from these three sources is essential to the welfare of the American people. Any attempt improperly to restrict it should be a matter of concern to all.

No Single Person Controls Press

Engaged in the business of gathering and disseminating information are more than 1500 daily newspapers, more than 500 Sunday newspapers, three great press associations with offices and correspondents located not only in every important city and community throughout the United States but the entire world, numerous picture and feature services, thousands of weekly and semiweekly newspapers and several thousand weekly, monthly and quarterly periodicals. All told, there are approximately 25,000 publications regularly printed and distributed in this country. They represent in their editorial columns all sorts of opinion. They represent a variety of ownership that is as American as the American scene itself. No one man, no group of men controls any great number of these publications. Neither any one individual nor any group of individuals, nor the Government itself can tell them what to print or what not to print.

Their contents depend solely upon the judgment of their editors as to what interests the American people and in that respect they differ from the publications of most nations in the world.

Further, you and I and all other citizens are free to publish whenever we choose. If we do not wish to express our views through an existing publication, we can do so by printing and distributing our own pamphlets, circulars or letters, or by entering the business itself. We are not restricted as to the subject of our discussion and we cannot be restricted in advance.

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2. Freedom of the press under the First and Fourteenth Amendments is secured against hostile action by the legislative, the executive, and the judicial branches of our Government. *Grosjean v. American Press*, 297 U.S. 233 (1936); *Near v. Minnesota*, 283 U.S. 697 (1931); *Bridges v. California*, 314 U.S. 252 (1940); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Murdock v. Pennsylvania*, 319 U.S. 104 (1943); *Lovell v. Griffin*, 303 U.S. 444 (1937).

We do not need a license to print. We cannot be required to take out a license in order to disseminate our views. But if we injure another or violate the laws of libel, he has his remedy in the rule of subsequent punishment.

Elections Demonstrate Importance of This Right

The importance of this right to impart or receive information was demonstrated in our nationwide elections held last November. In the great State of New York, for instance, a Republican was elected Governor, a Democrat was elected Senator, and an independent elected Mayor of our largest American city. No government decree silenced these candidates or their opponents. The people, as was their right, received information on all of the issues and voted according to their judgments.

A free election cannot be held unless the people have a free press.

It is a historical fact that every advance in individual liberty that has been recorded since the art of printing was invented has been won through the efforts of the courageous press. It is also a historical fact that every loss of liberty that has been recorded during the same period has been preceded by a subjugation of the press to the dictates of government.

In Germany for six years before the outbreak of World War II the press was compelled either to print or to omit from its columns whatever the Government ordered. The same was then and still is true in all dictator-ridden nations.

Forty-three days after coming into power, Hitler established his Ministry of Propaganda and placed at its head Dr. Joseph Goebbels. On November 19, 1934, Goebbels said:

> We train German journalists so well it is scarcely necessary to give orders. They already know instinctively what to do in critical situations.
>
> The press will continue to be disciplined in important problems. The German press will never again be an enemy of the government, but a co-worker with the government.

Following his rise to power Hitler suspended more than 1000 German newspapers. The *Berliner Tageblatt*, the *Frankfurter Zeitung*, the *Cologne Gazette*, great journals of former days, were taken over by the Ministry of Propaganda and their editors driven from the country.

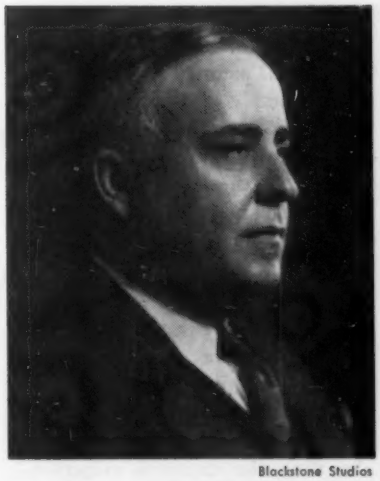
Argentine's *La Prensa* Is Latest Victim

Coming down to the present day we find that on March 16, 1951, Argentina's Congress, completely dominated by the dictator, Peron, and acting at his direction, put a virtual end to the 81-year-old life of that country's outstanding daily newspaper.

Less than one week later, the congressional committee that had been appointed to take over the newspaper *La Prensa* ordered the arrest of Dr. Alberto Gainza Paz, its editor, on a charge of violating "state security". Fortunately for the cause of liberty, the editor had managed to flee the country before his mortal enemy could bring about his arrest.

The background of the controversy between Peron and *La Prensa* is relatively unimportant. Suffice it to say that, supported by Peron, a news vendor's union had made demands that *La Prensa* close its branch circulation offices, turn over control of its circulation to the union and pay into the union treasury 20 per cent of the revenue from classified ads, the paper's main source of income. When *La Prensa* refused to meet these demands, the union struck. The next day the printers' union struck and publication ceased. Subsequently the plant was closed by court order upon the grounds that Dr. Gainza Paz had committed acts against the security of Argentina.

The important fact about the closing of *La Prensa* to us in the United States is that the procedures invoked and applied in Argentina are identical to those embraced with the approval of the United States Department of State in the draft of the Covenant on Human Rights now pending before the General Assembly of the United Nations.



Blackstone Studios

Elisha Hanson, of Washington, D. C., is a member of the District of Columbia and Maryland Bars. As counsel for the American Newspaper Publishers Association and for certain of its member papers, Mr. Hanson has participated in many of the leading cases involving the First Amendment, including among others *Grosjean* v. *American Press*, 297 U.S. 233 (1936); *Bridges* v. *California*, 314 U.S. 252 (1940); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); and *Craig* v. *Harney*, 331 U.S. 367 (1947). For three years he served as Chairman of the Committee on Freedom of the Press and Freedom of Speech of the Section of International and Comparative Law. Presently he is a member of the Special Committee of the American Bar Association To Investigate the Feasibility of a Scientific Study of the Effect of Mass Media Entertainment upon Law Enforcement and the Administration of Justice.

As an aftermath of World War II our Government adopted an almost unlimited policy of participating in world affairs with unprecedented resort to its treatymaking power for purposes that could not have been foreseen or even contemplated a few years ago. As a result of this new policy the American people are today confronted with the question as to whether or not in an attempt to give greater liberty to other peoples in the world they will destroy their own.

Until a few years ago no one would even have contended that the Executive of this country by and with the advice and consent of the Senate could have set aside any provision in the Federal Constitution through the exercise of the treatymaking power authorized in Article VI thereof.[3] Yet today we are faced with the very fact of that threat.

The United States appears to be the only country in the world today where treaties become a part of the law of the land on concurrence of two-thirds of the members of one branch of the legislature present at the time the treaty is considered; without approval of the whole national legislative body.

In 1920 the Supreme Court of the United States decided a controversy the significance of which is only now coming to be fully realized.[4] In its decision it held that a treaty, entered into by this country with Canada, whose provisions unquestionably invaded rights of the various states, did not conflict with the general terms of the Tenth Amendment, reserving to the states all rights not specifically granted to the Federal Government at the time the Constitution originally was ratified.

The full impact of this decision is now being experienced as a result of the creation of the United Nations and the treaties and conventions flowing therefrom.

The Charter of the United Nations was ratified in due course by the Senate. Subsequently, in a controversy arising in California, this Charter was held by a California Court to be paramount to local California law.[5] The effect of the California decision if it finally be upheld simply means that the President, with the concurrence of a two-thirds of the Senators present and voting, and this conceivably could be as few as thirty-three senators, may by the exercise of the treatymaking power abrogate our rights of free speech, to have a free press, to worship God according to our own beliefs, to assemble with our fellow men, to be free from unreasonable searches and seizures and all the other individual rights guaranteed us by our forefathers one hundred sixty years ago. The prohibitions in the Constitution on those subjects are against Congress and not the Senate and the President acting under the treaty power.

Treatymaking Power May Destroy All Rights

In other words by the simple expedient of exercising the treatymaking power all of our cherished concepts of liberty may be destroyed at one fell stroke. The threat is real.

Article 13 of the proposed Covenant on Human Rights provides that freedom to manifest one's religion or beliefs shall be subject to such limitations "as are pursuant to law and are reasonable and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".

The rights of free speech and to have a free press are, by the provisions of Article 14 of the Covenant, subjected to "penalties, liabilities and restrictions . . . as are provided by law and are necessary for the protection of national security,[6] public order, safety, health or morals, or of the rights, freedoms or the reputations of others".

Under Article 2 of the Covenant, the rights of free speech and to have a free press and to petition are subject to derogation in the case of "a state of emergency officially proclaimed by the authorities or in the case of public disaster".

The right of assembly referred to in Article 15 of the Covenant is also subjected to restrictions by the precise terms of that Article and to derogation by the terms of Article 2.

It is obvious that the authority for drafting this Covenant is to be found in Article 55 of the Charter of the United Nations as implemented by Article 56, by the terms of which the United States has pledged itself to take "action in cooperation with the organization for the achievement of the purposes set forth in Article 55".

Before taking up the penalties, liabilities and restrictions proposed to be inflicted upon the press, it should be pointed out that by the precise terms of the Covenant the right of a citizen to belong to the church of his own belief, to belong to a labor or business organization, even to belong to the American Bar Association, may be destroyed if those in authority should determine it to be to their interest to destroy it. All they would need do would be to proclaim that in the interest of national security, public safety or order or any of the other criteria set forth, such associations are forbidden.

If this observation seems fantastic it is earnestly suggested that a reading of the document will prove its truth.

As long as we have a press free to perform its function of gathering and disseminating information about matters of public importance and the acts and activities of those holding public office we shall not lose our individual liberties in America. Yet if the Covenant, as now drafted, should be ratified as a treaty of the United States, the very provisions approved by our State Department could be invoked to destroy any American newspaper just as *La Prensa* has been destroyed in Argentina.

Treaty on Information Is Another Threat

In an activity entered into pursuant to the provisions of Article 55 of the Charter, the United Nations during recent months made a direct frontal assault upon the American concept of a free press. One of its special committees, consisting of delegates representing fifteen nations, drafted a treaty on freedom of information. In early February over the strenuous

(Continued on page 477)

3. *Article VI of the Constitution provides this:* This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

4. *Missouri* v. *Holland*, 252 U.S. 416 (1920).

5. *Sei Fujii* v. *The State*, 217 P. (2d) 481; 218 P. (2d) 595 (1950).

6. National security was the reason offered by Peron for silencing *La Prensa*.

Congressional Concurrent Resolutions:

An Aid Statutory Interpretation?

by Rankin M. Gibson • of the Missouri Bar

■ A resolution passed by one or both Houses of Congress may have a variety of legal effects: a joint resolution signed by the President has the force and effect of law. A simple resolution passed by one House has no effect at all "outside the Capitol", as Mr. Gibson puts it. Between joint and simple resolutions lies the concurrent resolution. Its force is often ambiguous and uncertain. In this article, Mr. Gibson discusses these matters, examining especially the problem of the concurrent resolution passed to influence construction of a statute.[1]

■ Certain school interests were discontented with one or more aspects of the administration of the education and training program under the so-called "G. I. Bill of Rights". Consequently, Senate Bill 2596 was introduced in the first session of the 81st Congress. Following a thorough study of the program and its administration, by both the Congress and the President, S. 2596, as amended, became law on July 13, 1950.[2] The Administrator of Veterans' Affairs, who is charged with the administration of the education and training program, thereafter issued regulations and instructions for the purpose of placing into operation the legislative mandate contained in the Act.

On September 12, 1950, Senator Humphrey for himself, Senator Pepper, Senator Douglas, Senator Taft and Senator Morse introduced for consideration Senate Concurrent Resolution 107.[3] It was referred to the Senate Committee on Labor and Public Welfare and reported out without amendment on the same day. The following day the Senate passed S. Con. Res. 107 with a formal amendment. It was referred to the House Committee on Veterans' Affairs, where it died on the expiration of the 81st Congress.

Without the formal introductory parts, the concurrent resolution read as follows:

> Whereas the intent of Congress as set forth in Public Law 266, Eighty-first Congress, the Independent Offices Appropriations Act, 1950, approved August 24, 1949, pertaining to the manner in which funds available thereunder could be spent for education and training of veterans was to some extent misinterpreted or misconstrued in carrying out the terms of Public Law 266; and
>
> Whereas the Congress, in order to remove any ambiguity which might have existed with respect to the language contained in Public Law 266, revised and enlarged upon the original language contained therein by enacting remedial legislation in the form of Public Law 610, Eighty-first Congress, approved July 13, 1950; and
>
> Whereas there has apparently been some misunderstanding of the congressional intent as expressed in Public Law 610 and as set forth in the statement of the House managers in explanation of the action agreed upon and recommended in the conference report on such legislation: Therefore be it
>
> *Resolved by the Senate (the House of Representatives concurring)*, that for the purpose of interpreting the terms of Public Law 610, Eighty-first Congress, approved July 13, 1950, it is hereby declared that—
>
> 1. The provisions of section 2 of Public Law 610, which amended paragraph 11, part VIII, of Veterans Regulation Numbered 1 (a), as amended, relating to the customary cost of tuition and to other charges required by educational institutions for the training of veterans under that Act were and are intended to apply to all courses of training covered by contract or other agreement, without respect to the calendar duration established of the weekly hours of attendance required for such courses.
>
> 2. By enacting the provisions of section 2 of Public Law 610, it was and is intended that a contract including tuition, fees, or other charges for a course shall be considered as an entity in determining the rate or rates to be paid to the institution for such course.
>
> 3. Section 3 of Public Law 610, which amended paragraph 5 of part VIII of Veterans Regulation Num-

1. Although this article is primarily concerned with the federal practice, obviously much of it is applicable to the practice within the various states. Unless otherwise indicated, however, the discussion contemplates only the federal situation.

2. Public Law 610, 81st Congress, July 13, 1950.

3. The sponsors of the resolution are all members of the Senate Committee on Labor and Public Welfare, which originally considered S. 2596, 81st Congress, as introduced by Senator Taft.

bered 1 (a), as amended, was and is intended to provide that any institution (and not only institutions of higher learning) shall be regarded as a nonprofit institution for the purpose of applying the governing statutes and applicable regulations of the Veterans' Administration respecting the payment of tuition and other charges, in the case of nonprofit institutions, if it is exempt from taxation under paragraph (6), section 101, of the Internal Revenue Code, whether it was certified as such by the Bureau of Internal Revenue before or subsequent to June 22, 1944.

4. It was and is the congressional intent, by enacting Public Law 610, that, in the case of any educational or training institution which has entered into one or more contracts in two successive years, the rate established by the most recent contract shall be considered the customary cost of tuition.

It will be observed that the resolution purported to reflect and clarify the legislative intention existing at the time of the enactment of the Act. If S. Con. Res. 107 had been passed by the House of Representatives, without substantial amendments, the Veterans' Administration and perhaps ultimately the courts would have been faced with the problem of deciding what effect, if any, should have been given to it in construing the Act of July 13, 1950.[4]

The potential problems which were raised by the Senate's passage of S. Con. Res. 107 brought in issue basic questions which will be explored herein. An effort will be made to sketch out partial answers, at least, to some of the following questions: What is a concurrent resolution of Congress? When is it used? What is its general effect? Have there been other instances of congressional attempts at legislative interpretation by means of a concurrent resolution? Would the passage of such a resolution have real evidentiary value? What should be the effect of such a concurrent resolution on the construction of previously enacted statutes?

Three Kinds of Resolution Explained, Distinguished

Resolutions are less formal than bills, consequently they are generally less authoritative expressions of

4. Sections 2 and 3 of Public Law 610 read as follows:

Sec. 2. Paragraph 11 of part VIII of Veterans Regulation Numbered 1 (a), as amended, is amended by adding at the end thereof a new subparagraph (d) as follows:

"(d) As used in this part, the term 'customary cost of tuition' or 'customary charges' or 'customary tuition charges' shall mean that charge which an educational or training institution requires a nonveteran enrollee similarly circumstanced to pay as and for tuition for a course, except that the institution (other than a nonprofit institution of higher learning) is not regarded as having a 'customary cost of tuition' for the course or courses in question in the following circumstances:

"(A) Where the majority of the enrollment of the educational and training institution in the course in question consists of veterans in training under Public Laws 16 and 346, Seventy-eighth Congress, as amended; and

"(B) One of the following conditions prevails:

"1. The institution has been established subsequent to June 22, 1944.

"2. The institution, although established prior to June 22, 1944, has not been in continuous operation since that date.

"3. The institution, although established prior to June 22, 1944, has subsequently increased its total tuition charges for the course to all students more than 25 per centum.

"4. The course (or a course of substantially the same length and character) was not provided for nonveteran students by the institution prior to June 22, 1944.

"For any course of education or training for which the educational or training institution involved has no customary cost of tuition, a fair and reasonable rate of payment for tuition, fees, or other charges for such course shall be determined by the Administrator. In any case in which one or more contracts providing a rate or rates of tuition have been entered into in two successive years, the rate established by the most recent contract shall be considered to be the customary cost of tuition notwithstanding the definition of 'customary cost of tuition' as hereinbefore set forth. For the purpose of the preceding sentence 'contract' shall include contracts under Public Law 16 (Seventy-eighth Congress, March 24, 1943), Public Law 346 (Seventy-eighth Congress, June 22, 1944), or any other agreement in writing on the basis of which tuition payments have been made from the Treasury of the United States. If the Administrator finds that any institution has no customary cost of tuition he shall forthwith fix and pay or cause to be paid a fair and reasonable rate of payment for tuition, fees, and other charges for the courses offered by such institution. Any educational or training institution which is dissatisfied with a determination of a rate of payment for tuition, fees, or other charges under the foregoing provisions of this paragraph, or with any other action of the Administrator under the amendments made by the Veterans' Education and Training Amendments of 1950, shall be entitled, upon application therefor, to a review of such determination or action (including the determination with respect to whether there is a customary cost of tuition) by a board to be known as the 'Veterans' Education Appeals Board' consisting of three members, appointed by the President. Members of the Board shall receive, out of appropriations available for administrative expenses of the Veterans' Administration, compensation at the rate of $50 for each day actually spent by them in the work of the Board, together with necessary travel and subsistence expenses. The Administrator of Veterans' Affairs shall provide for the Board such stenographic, clerical, and other assistance and such facilities and services as may be necessary for the discharge of its functions. Such Board shall be subject, in respect to hearings, appeals, and all other actions and qualifications, to the provisions of sections 5 to 11, inclusive, of the Administrative Procedure Act, approved June 11, 1946, as amended. The decision of such Board with respect to all matters shall constitute the final administrative determination. In no event shall the Board fix a rate of payment in excess of the maximum amount allowable under the Servicemen's Readjustment Act of 1944, as amended. Nothing contained in these amendments shall in any way affect the provisions of the first proviso in paragraph 1 of this part VIII, as amended.

"Any institution having a 'customary cost of tuition' established under this part may revise and improve an existing course (or establish a new related course) of substantially the same length and character subject to the same customary cost of tuition: *Provided*, That nothing in the foregoing amendments shall be construed to affect adversely any legal rights which have accrued prior to the date of enactment of the Veterans' Education and Training Amendments of 1950, or to affect payments to educational or training institutions under contracts in effect on such date: *Provided further*, That during negotiations for a contract, and during the pendency of any appeal which a school may make, the Veterans' Administration shall continue to make further payments to the school in such amount as the Administrator considers to be 'fair and reasonable', but not less than 75 per centum of the most recent rate paid to the school.

"Any educational or training institution which has a contract covering any period subsequent to August 24, 1949, shall be entitled to a review by the Veterans' Education Appeals Board of the rate of tuition, fees and other charges established in such contract. Application for such review must be made within sixty days following the date of enactment of the Veterans' Education and Training Amendments of 1950."

Sec. 3. Paragraph 5 of part VIII of Veterans Regulation Numbered 1 (a), as amended, is further amended by inserting before the period at the end thereof a colon and the following: "*And provided further*, That for the purpose of applying the governing statutes and applicable regulations of the Veterans' Administration respecting the payment of tuition and other charges, in the case of nonprofit institutions, any institution shall be regarded as a nonprofit institution if it is exempt from taxation under paragraph (6), section 101, of the Internal Revenue Code, whether it was certified as such by the Bureau of Internal Revenue before or subsequent to June 22, 1944: *And provided further*, That for the purpose of applying the governing statutes and applicable regulations of the Veterans' Administration respecting the payment of tuition and other charges, any professional or graduate school which has been continuously affiliated with an educational institution since June 22, 1944, may elect to be subject to the nonresident tuition rates established for such educational institution, with respect to payments made for tuition during any school year beginning on or after August 1, 1949, even though the administrative function of such school is separate and distinct from that of the institution with which it is affiliated".

legislative action.[5] There are three kinds of resolution now in use: simple, concurrent or joint. In order to fully understand the role played by a concurrent resolution one must be generally familiar with the roles played by the other two types of resolutions.

A simple resolution is a formalized motion passed by the members of a single legislative house. It is an expression of the will, wish, view or opinion of the House adopting it.[6] Concurrence of the other House is not required. It is commonly used to extend sympathy on the death of a member, to authorize the printing of special reports, to create special committees, to request information from administrative agencies and to express the sense of the legislative house to another governmental body.[7] Simple resolutions usually affect matters relating only to the House concerned.

A joint resolution closely resembles a bill both as to form and procedure for adoption. Although there is a theoretical difference between the contents and use of a bill and the contents and use of a joint resolution, practical usage in the Congress leaves little of the distinction sometimes made.[8] In recent years much major legislation has taken the form of a joint resolution; it is now rather generally conceded that a joint resolution of Congress is just as much a law as a bill after passage and approval. For example in recent years the Secretary of State has started placing all joint resolutions passed in the Statutes at Large as either "Private Law __" or "Public Law __".[9] Joint resolutions are submitted and passed in one House before being sent to the other House. Changes made by one House must be ratified by the other. Presidential action is required. In general, a joint resolution follows the same legislative course as a bill. Although purely a congressional matter, constitutional amendments are proposed by joint resolution. The President neither has nor attempts to exercise a veto power over resolutions proposing constitutional amendments.[10] As early as 1798 it was determined that approval by the President of a joint resolution proposing a constitutional amendment is not requisite.[11] A duly enacted joint resolution has the effect of law.[12]

In the modern practice the concurrent resolution has been developed as a vehicle for expressing facts, principles, opinions, and purposes of the two Houses of Congress.[13] It is, for most purposes, merely a simple resolution which is passed by both Houses. Since a concurrent resolution has the force of both Houses it must be approved by both. It expresses the opinion of the entire Congress instead of a single House as is true in the case of a simple resolution. It is used to dispose of matters in which both Houses have an interest, *e.g.*, the creation of a joint investigating committee or the adjournment of the Congress. It is not issued as a slip law after passage but is printed together with other duly passed concurrent resolutions in the appropriate volume of Statutes at Large.[14]

President Does Not Approve Concurrent Resolutions

Article I, Section 7, of the United States Constitution, with regard to Presidential approval of concurrent resolutions, provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

In spite of the clear intendment of the Constitution, concurrent resolutions have not, for more than a century, been sent to the President for approval. This has been excused on the ground that a concurrent

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5. Sutherland, *Statutes and Statutory Construction* (3d ed. 1943) §3801.

6. *Id.* §3802; Riddick, *The United States Congress: Organization and Procedure* (1949) 22.

7. See the index volume to the Congressional Record of any recent session of the Congress. It contains the history of all bills and resolutions introduced in both Houses during the session. The titles of resolutions shown therein will indicate the types of matters handled by resolutions of various kinds.

8. Riddick, *op. cit. supra*, page 21; Art. I, §7, United States Const., provides that every bill properly enacted shall "become a Law" and that every joint resolution duly enacted shall "take Effect".

9. By Reorganization Plan No. 20, effective May 24, 1950, the functions relative to the numbering and publication of the federal statutory laws of the land theretofore performed by the Secretary of State were transferred to the General Services Administration.

10. Walker, *The Legislative Process: Lawmaking in the United States* (1948) 357.

11. *Hollingsworth* v. *Virginia*, 3 Dall. 378, 1 L. ed. 644 (1798). According to Myers, "Joint Resolutions Are Laws", 28 *A. B. A. J.* 33 (1942), President Buchanan approved the joint resolution of March 2, 1861, and President Lincoln approved on February 1, 1865, that which became the Thirteenth Amendment.

12. 15 Stat. 40 (1868), 5 U. S. C. §165 (1926); *Fourteen Diamond Rings, Emil J. Pepke, Claimant* v. *United States* (The Diamond Rings), 183 U. S. 176, 184, 22 S. Ct. 59, 46 L. ed. 138, 144 (1901); *Watts* v. *United States*, 161 F. (2d) 511, 513 (C. C. A. 5th 1947); *Wells et al.* v. *United States*, 257 Fed. 605, 610 (C.C.A. 9th, 1919); Myers, *supra* note 11.

13. *Hind's Precedents*, §§1566-67.

14. Myers, *supra*, 35.

resolution does not contain a proposition of legislation.[15] The House Manual indicates that a concurrent resolution "is not sent to the President for approval unless it contains a proposition of legislation, which is not within the scope of the modern form of concurrent resolution".[16]

Normally, a concurrent resolution is drafted in the same manner as bills except that it is more likely to contain a preamble. As a result of a gradual evolution in legislative practice, Congress has acquired an established form for concurrent resolutions. In 1828, the Senate sent a resolution to the House with the resolving clause in this form: *"Resolved,* That, if the House of Representatives concur, the Senate will, in conjunction with the House of Representatives, attend the funeral of Major-General Brown...." In 1843, a concurrent resolution was used in this form: *"Resolved (the Senate concurring),* That two Chaplains, ...be elected...." For many years, when the resolution originates in the House, the resolving clause has been in form as follows: *"Resolved by the House of Representatives (the Senate concurring),* That...." Concurrent resolutions originating in the Senate have used this resolving clause: *"Resolved by the Senate (the House of Representatives concurring),* That...."[17] The resolving clauses frequently are preceded by "whereas" clauses, as in S. Con. Res. 107, setting forth the reasons for the adoption of the resolution. As is apparent from the form of the resolving clauses now in use, a concurrent resolution is binding on neither House until agreed to by both.

Although the terms "joint" and "concurrent" are frequently used synonymously, such use is particularly inaccurate and confusing with respect to legislative resolutions. The features distinguishing joint resolutions from concurrent resolutions are the necessity for presidential action and the greater procedural safeguards required in the enactment of joint resolutions as well as the difference in type of matters dealt with by each. The distinction between "joint" and "concurrent" resolutions must be kept in mind constantly, particularly when reading the opinions of state courts where the term "joint" is frequently used in discussing what is actually a concurrent resolution.

As heretofore noted, concurrent resolutions are generally used to express facts, principles, opinions or the legislative will with respect to subjects or matters not requiring executive approval. They speak for the membership of both Houses. Although it is both impractical and unnecessary to list all the instances in which a concurrent resolution has been used, it is of value in understanding the congressional concurrent resolution to enumerate some occasions for its use. A common use of this instrument is to correct errors in enrolled bills.[18] It has been used by the two Houses to join two standing committees and constitute them a joint committee.[19] Concurrent resolutions also have been used to create a congressional commission including persons not members of the Congress;[20] to create a joint committee to arrange for the inauguration of the President Elect of the United States;[21] to express opinions or determinations on important public questions.[22] In 1906, Congress by concurrent resolution directed the Secretary of War to make an investigation of river and harbor matters.[23] By concurrent resolutions conferees were authorized to amend a bill in conference;[24] officers of the two Houses were authorized to cancel their signatures to an enrolled bill;[25] the action of the Speaker and the Vice President in signing an enrolled bill was rescinded and the bill amended;[26] a bill sent to the President but not yet signed by him was recalled;[27] and a joint meeting of the two Houses to count the electoral votes was provided for.[28]

Concurrent Resolutions Are Not Law

With respect to the general effect of concurrent resolutions, it has been said that they are binding on neither House until agreed to by both.[29] In general it may be said that they are not law[30] because they are not legislative in character. It has been contended that a concurrent resolution is without force and effect beyond the confines of the Capitol.[31] Although the concurrent resolution speaks for the entire Congress, it has only a limited legal effect.[32] Generally where concurrent resolutions are used not merely to promulgate legislative addenda or similar matters, but rather to ratify an appointment by the Executive,[33] to authorize the purchase of supplies,[34] to repeal a law,[35] or to ratify a deed,[36] the courts have rejected them as not binding.

In recent years Congress has incorporated language in a number of laws authorizing the Congress, by use of a concurrent resolution, to re-

(Continued on page 479)

15. Sutherland, *op. cit. supra* note 1, §3803; White, "The Concurrent Resolution in Congress" 35 *Am. Pol. Sci. Rev.* 886 (1941).
16. House Doc. No. 769, 79th Cong., 2d Sess., §396.
17. 4 *Hind's Precedents*, §3378.
18. Riddick, *loc. cit. supra, page 21; 7 Cannon's Precedents*, §§1042, 1068-70.
19. 4 *Hind's Precedents*, §§4412, 4414-15.
20. 4 *id.* §4703.
21. 3 *id.* §§1998-99.
22. 2 *id.* §§1562, 1566-67.
23. 2 *id.* §1593.
24. 7 *Cannon's Precedents*, §1071.
25. 7 *id.* §1077.
26. 7 *id.* §§1078-80.
27. 7 *id.* §1091.
28. 6 *id.* §443. For a quick review of the number of concurrent resolutions introduced and the matters dealt with therein see the index volume of the Congressional Record for any recent session of Congress, which contains the history of all bills and resolutions introduced in both Houses during the session.
29. 4 *Hind's Precedents*, §3379.
30. *F. H. E. Oil Co. v. Commissioner of Internal Revenue*, 150 F. (2d) 857, 858 (C.C.A. 5th, 1945); *Moran v. La Guardia*, 270 N. Y. 450, 1 N. E. (2d) 961, 962 (1936); *Boyer-Campbell Co. v. Fry*, 271 Mich. 282, 260 N. W. 165, 170 (1935); *Becker v. Detroit Savings Bank*, 269 Mich. 432, 257 N. W. 853, 854 (1934); *Cleveland Terminal & V. R. Co. v. State*, 85 Ohio St. 251, 97 N. E. 967, 973 (1912); *Mullan v. State*, 114 Calif. 578, 46 Pac. 670, 672, (1896); *People ex. rel. Burritt v. Commissioners State Contracts*, 120 Ill. 322, 11 N. E. 180, 188 (1887).
31. 7 *Cannon's Precedents*, §1037.
32. Sutherland, *op. cit. supra*, §3803.
33. *Mullan v. State*, cited *supra*, note 30.
34. *People ex rel. Burritt v. Commissioners State Contracts*, cited *supra*, note 30.
35. *Moran v. La Guardia*, cited *supra*, note 30.
36. *Cleveland Terminal & V. R. Co. v. State*, cited *supra*, note 30.

A Special Court for Patent Litigation?

The Danger of a Specialized Judiciary

by **Simon Rifkind** • of the New York Bar (New York City)

■ In this article, Judge Rifkind answers the recurring demand that a special court for trying patent cases be created. His argument rests on the assumption that judges should be men with a broad outlook upon the law and he declares that creating specialized judges in the patent field would soon lead to sterility in that area of the law.

■ Periodically one hears the suggestion that patent cases should be tried before patent judges. The proposals take a variety of forms but they all revolve about the proposition that the judicial product of patent litigation would be improved if the trials were conducted by judges specializing in patent cases.

I deny this pivotal proposition; consequently I am opposed to patent courts or patent judges.

The highly industrialized society in which we live has a great appetite for "know-how". Such a society elevates and aggrandizes the position of the expert. His is the voice with the ready answer. His opinions become the facts upon which lesser mortals—laymen—risk life and fortune.

Against the citadel of the expert I tilt no quixotic lance. My contention is that the judicial process requires a different kind of *expertisse* —the unique capacity to see things in their context. Great judges embrace within their vision a remarkably ample context. But even lesser men, presiding in courts of wide jurisdiction, are constantly exposed to pressures that tend to expand the ambit of their ken.

The patent law does not live in the seclusion and silence of a Trappist monastery. It is part and parcel of the whole body of our law. It ministers to a system of monopolies within a larger competitive system.

This monopoly system is separated from the rest of the law not by a steel barrier but by a permeable membrane constantly bathed in the general substantive and procedural law. Patent lawyers tend to forget that license agreements are essentially contracts subject to the law of contracts; that infringements are essentially trespasses subject to the law of torts; that patent rights are a species of property rights; and that proof in patent litigation is subject to the laws of evidence. Changes in all these branches of the law today have an effect on the patent law as well. As long as judges exercising a wide jurisdiction also try patent cases, so long do the winds of doctrine, the impulses towards slow change and accommodation, affect the patent law to the same degree as they affect the general body of the law.

In a democratic society the law, in the long run, tends to approach commonly accepted views of right and wrong. Thereby it continues its hold on the respect and allegiance of the people—in the last analysis its major sanction. Once you segregate the patent law from the natural environment in which it now has its being, you contract the area of its exposure to the self-correcting forces of the law. In time such a body of law, secluded from the rest, develops a jargon of its own, thought-patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law.

Such conflicts, when they emerge in spectacular form, induce a public cynicism about the law and a sense of injustice. In such a climate the patent system may not fare too well.

Specialized Judiciary Leads to Decadence of Law

Moreover, a specialized patent court would breed other unfortunate consequences. The patent Bar is already specialized. At present, however, patent lawyers practice before nonspecialized judges and accommodate themselves to the necessity of conveying the purposes of their calling to laymen. Once you complete the circle of specialization by having a specialized court as well as a spe-

cialized Bar, then you have set aside a body of wisdom that is the exclusive possession of a very small group of men who take their purposes for granted. Very soon their internal language becomes so highly stylized as to be unintelligible to the uninitiated. That in turn intensifies the seclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system of law. In time, like a primitive priestcraft, content with its vested privileges, it ceases to proselytize, to win converts to its cause, to persuade laymen of the social values that it defends. Such a development is invariably a cause of decadence and decay.

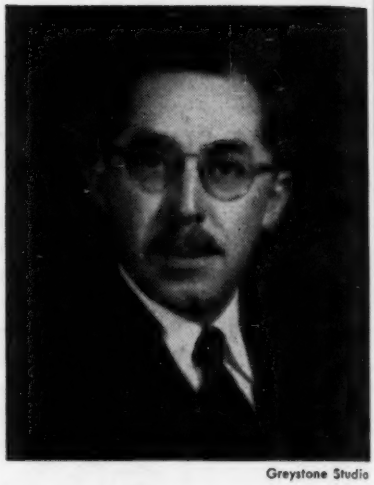
The root of the matter is that there is a difference between specialization on the administrative level and specialization on the judicial level. On the administrative level there is advantage to be derived from close familiarity with the pattern of activity which is the subject of administrative action and regulation. The very essence of the judicial function, however, is a detachment from, a dispassionateness about the activity under scrutiny.

The views thus far expressed are of general derivation. They are not especially related to the patent law. They are equally pertinent to the admiralty law, to bankruptcy, to security regulation, or any other of the great provinces of the law. The views expressed stem from a conception of the place and function of the law in a democratic society as the arbiter and mediator of conflicting social interests and demands. A one-function court cannot assist the law to discharge that responsibility.

No Benefit Will Be Obtained from Having Patent Court

The patent law itself contributes a number of considerations which weigh against the proposal for a patent court. One of these is that the benefits of expert knowledge which are forecast by the proponents of the change will not be realized in any substantial degree. It is hardly to be supposed that the members of a patent court will be so omniscient as to possess specialized skill in chemistry, in electronics, mechanics and in vast fields of discovery as yet uncharted. The expert in organic chemistry brings no special light to guide him in the decision of a problem relating to radioactivity. Consequently, even judges serving upon a specialized patent court will, in any particular case, prove to be non-experts except only with respect to the patent law itself. But knowledge of the patent law has never presented any grave problem. The patent law presents no greater difficulties to its mastery than any other branch of the law. Reading the judicial literature created through patent litigation I am not aware of any marked deficiency on the part of the present judiciary in comprehending the principles of law relevant to a decision in patent cases.

Another consideration derived from the patent law is that changes in patent litigation have already made the proposal stale. Patent litigation has overflowed its ancient channel. Today one who can navigate only in so-called pure patent law is inadequate as a patent lawyer and insufficient as a patent judge. Today patent litigation is most frequently met with in close association with other branches of the law such as unfair competition, trade-marks, confidential submissions, antitrust and corporate reorganizations. It is apparent that the patent expert can be only moderately learned in all these additional departments. It follows that, like most experts, he can bring his special knowledge to bear on the problem but is not especially fitted to perform the judicial task of extracting a solution by subjecting the problem to the filtering process of many strata of knowledge.



Greystone Studio

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Very recently, Judge Harold Medina in an address to the patent Bar, widely published, described the distressing experiences he encountered in trying his first patent case. The address was very entertaining as it was meant to be. However, it did not support the inference which some have drawn from it that the cure for such judicial distress is a special patent Bench. Every new judge is confronted by cases in fields of law in which he had not previously practiced. Every competent judge overcomes this handicap of lack of familiarity within a reasonable time. If the patent law has already become so esoteric a mystery that a man of reasonable intelligence cannot comprehend it, then something has gone seriously wrong with the patent law. If that is so—and I do not hold this view—the cure lies in correcting the law, not in tinkering with the Bench.

Banks and the Antitrust Laws: An Unresolved Problem

by **Mary Louise Ramsey** • of the Illinois Bar (Chicago)

■ There is little doubt, Miss Ramsey says, that banks and bank holding companies can be made subject to the antitrust laws. There is considerable doubt, however, as to whether Congress intended the antitrust laws to apply to banks. This question has been debated ever since 1944 when the Supreme Court decided *United States* v. *South-Eastern Underwriters Association*. Miss Ramsey's article is a survey of the whole problem of antitrust law as it may affect banking.

■ Ever since the Supreme Court ruled, in *United States* v. *South-Eastern Underwriters Association*,[1] that an association of insurance underwriters was liable to prosecution under the Sherman Act, lawyers have debated whether or not that statute also applies to banks. An antitrust suit instituted against the Mortgage Conference of New York in 1946 was settled by a consent decree which dissolved the conference and enjoined thirty-three banks and insurance companies from agreeing upon interest rates and other mortgage terms. A proceeding now pending before the Federal Reserve Board, charging Transamerica Corporation, the nation's largest bank holding company, with violation of the Clayton Act,[2] is likely to reach the Supreme Court eventually.

Only four Justices, two of whom are now deceased, concurred in the *South-Eastern Underwriters* decision; three, including Chief Justice Stone, dissented, and two did not participate. That Congress could make the Sherman Act applicable to insurance companies was not denied, but there was disagreement as to whether it had done so. After reviewing the history of the antitrust laws, the dissenters concluded that the lawmakers did not intend the insurance business to be so regulated. Much of what was said on both sides is pertinent to banking. Yet there are sufficient differences between banking and insurance to require fresh consideration of the subject.[3] On that issue, too, the question of intent would be important. Laws subjecting banks to special supervision, particularly new legislation touching any aspect of the problem, would be scrutinized for clues revealing such intent. All this gives added significance to current proposals—which in themselves are of no small importance—for the regulation of bank holding companies.

Multiple-office banking did not get under way on a large scale in the United States until after World War I. By 1947, twenty-eight holding companies controlled hundreds of banking offices in nearly every section of the country, with a heavy concentration in the West. As a result of a thorough investigation of branch, chain and group banking made by a congressional committee in 1930, the Banking Act of 1933 gave the Federal Reserve Board a limited control over holding company affiliates of its member banks. Such an affiliate cannot vote its stock in a member bank without a voting permit from the Board. To obtain such a permit, it must agree to sever its ties with any securities companies, to submit to examinations, to pay dividends only out of earnings and to accumulate certain reserves. Dealings between a member bank and affiliated companies are restricted. Broadly speaking, only a company which holds a majority of the stock of a member bank or which directly or indirectly elects a majority of its directors is deemed a holding company affiliate.

Several companies have avoided regulation by various means. Some have managed to exercise control with minority stock ownership, or without voting their stock in majority-owned banks. Others have withdrawn their banks from the Federal Reserve System. Since 1943 the Board has been urging enactment of a

1. 322 U.S. 533 (1944).

2. Section 8 of the Clayton Act, 15 U.S.C. 19 (1946), concerning interlocking directors and officers, applies to member banks of the Federal Reserve System.

3. Cf. A. A. Berle, Jr., "Banking Under the Anti-Trust Laws", 49 Col. L. Rev. 589 (1949).

broader and stronger measure. Four years ago such a bill was reported to the Senate but died on its calendar. A revised version was introduced into both Houses of the 81st Congress.[4] After extensive hearings by a subcommittee of the Senate Banking and Currency Committee, its chairman, Senator A. Willis Robertson, submitted an entirely new bill.[5] This drew a strong protest from the Federal Reserve Board, and the matter was put over until the next Congress. Subsequently, efforts were made to reconcile the opposing views but no agreement was reached prior to the resignation of the Chairman of the Federal Reserve Board, Thomas B. McCabe. The matter now hinges upon the attitude of the new chairman, William McChesney Martin, Jr.

On broad objectives—to regulate the expansion of bank holding companies and to require divestment of nonbanking assets—there is no disagreement. The differences of opinion relate only to methods of reaching the desired results. Four significant points are at issue: the scope of the definition of bank holding companies, the operation of the antitrust laws with respect to such companies, the distribution of administrative responsibility, and methods of enforcement.

Federal Reserve Board's Bill Is Explained

Under the bill sponsored by it, the Federal Reserve Board would be authorized to declare any company to be a bank holding company, irrespective of the percentage of stock ownership, if the company alone or in combination with others, controlled (1) two or more banks, or (2) one bank having four or more branches, or (3) one bank, where controlled by another bank whether or not the banks are members of the Federal Reserve System. Any company which controls 15 per cent of the voting shares of such banks or of a bank holding company would be covered unless exempted by the Board. This definition reaches every charitable foundation, insurance company, investment firm or local business enterprise which holds the requisite stock. Unless and until exempted by the Board, all would have to comply with the requirements of the Act, including the accumulation of reserves. Unlike the Public Utility Holding Company Act, this bill does not suspend its application to any company which in good faith seeks exemption, while its petition therefor is pending.

Senator Robertson's bill does not go so far. It applies to any organization which directly or indirectly owns or controls 50 per cent of the shares of an insured bank, or which controls the election of a majority of the directors of such bank, or for the benefit of whose shareholders more than 50 per cent of the shares of an insured bank is held by trustees, provided the company owns or controls more than 5 per cent of the voting shares of more than two banks. Pyramided companies are not mentioned.

To control the growth of bank holding companies, the Board would require approval for the creation of new holding companies or for the expansion of existing ones by the opening of branches or by the acquisition of stock or assets of other banks. A holding company would have to obtain the Board's consent to acquire the stock or assets of a bank. Subsidiary banks could secure permission to open branches or to purchase the assets of another bank from the Board, the Comptroller of the Currency or the Federal Deposit Insurance Corporation, depending upon the status of the applicant.[6] The Robertson Bill deals only with the acquisition of bank shares. Authority to approve such transactions would be shared by the Federal Reserve Board, the Comptroller, and the FDIC. This diffusion of responsibility would act as a check on the possibility of arbitrary administration. It might also paralyze the hand of government, sometimes to the advantage, and at other times to the disadvantage, of the banks affected. Misgivings on this score have been increased by the current litigation over the attempt of the Bank of America to convert into branches more than a score of banks owned by Transamerica Corporation. After the Comptroller of the Currency had approved the conversion, the Federal Reserve Board obtained an order from a federal court halting the transaction because the banks are involved in the pending proceedings in which the Board has charged Transamerica with a violation of the Clayton Act.

Bill States National Policy Against Restraint of Trade in Banking

No less important than the scope and distribution of administrative authority is the policy laid down by Congress for its exercise. In the light of changes which it has undergone, the provisions of the Board's bill are significant not only for the administration of holding company legislation, but also for their possible influence on the interpretation of the present antitrust laws. Like the measure previously reported to the Senate, this bill enumerates the factors that the supervisory agencies must weigh in passing upon applications to expand. The former required consideration of "the financial history and condition of the applicant and the banks concerned; their prospects; the character of their management, the convenience, needs, and welfare of the communities and the area concerned; and *the national policy against restraint of trade and undue concentration of economic power and in favor of the maintenance of competition in the field of banking, Provided however that nothing herein contained shall be construed to authorize the approval of any acquisition . . . where, regardless of its competitive or other aspects,* the effect of such acquisition may be to expand the size and ex-

4. S. 2318, 81st Congress, 1st Session (1949).
5. S. 3547, 81st Congress, 2d Session (1950).
6. To a large extent the opening of branches is already controlled by supervisory agencies. S. 2318 would extend this control to certain situations not covered by existing law and would make the policies therein stated applicable to the establishment of any branch by a bank holding company or by one of its subsidiary banks.

tent of a bank holding company system beyond limits consistent with adequate and sound banking and the public interest".

The italicized portion, which embodied the policy of the antitrust statutes, was omitted from the later bill. Also dropped was the declaration of policy which in the earlier version expressed the purpose of Congress "generally to maintain competition among banks and to minimize the danger inherent in the concentration of economic power through centralized control of banks". The test of expansion "beyond limits consistent with adequate and sound banking and the public interest" is by no means equivalent to the deleted standard. It applies only to size, not to competition. Determination of the degree of expansion which is compatible with the public interest is left entirely to administrative officials. Acquisitions which eliminate competition may be approved without even "considering" a policy in favor of competition. In the Sherman Act, Congress itself determined that the public interest demands the maintenance of competition. Elsewhere, as in the Interstate Commerce Act, when the lawmakers have sanctioned consolidations and concerted action upon approval of government agencies, they have expressly exempted such conduct from the antitrust laws. Here, the bill neither requires that the administrative action effectuate the policy of those statutes nor withdraws approved transactions from their purview. These circumstances might prove sufficient to tip the scales of judicial opinion to the conclusion that Congress never intended those laws to apply to banks or bank holding[7] companies.

Senator Robertson's bill is not open to this objection. It explicitly directs the supervisory agencies to consider "the policy of Congress, hereby declared, in favor of local ownership and control of banks and competition in the field of banking".

The threat to free competition and sound banking inherent in the combination of banking with other enterprises is widely recognized. Although the range of permissible operations varies in different states, banks usually are confined to the business of banking. Holding companies, however, have been free from such restraints. Both of the proposed measures are intended to put an end to this immunity, but the efficacy of their provisions is open to debate.

Board's Bill Would Prohibit Banks from Owning Stock of Other Business

Under the Board's bill, it would be unlawful, after two years, for a bank holding company to own securities of any company other than a bank, or to engage in any business other than banking, or managing or controlling subsidiary banks. The term "banking" is not defined. If construed narrowly, a bank which is a holding company might have to give up various activities, such as title guarantee, fur storage, insurance or real estate management, in which it is permitted to engage under state law. A title and trust company which owns another such company might be compelled to divorce its title guarantee business although its subsidiary could continue both. A literal interpretation would also impose a death sentence on pyramided holding companies because bank holding company stock would not be a lawful investment after two years. Such companies were not covered by the 1947 bill, from which this provision was derived. Inasmuch as other sections which would affect pyramided companies were not modified to take account of their inclusion in the definition of the later bill, it is not clear what the framers had in mind with respect to them.

This restriction on extraneous investments does not apply to subsidiary banks. The term "bank" is defined to cover any trust company which does a trust business in the United States. It is not limited to institutions which receive deposits. There is great diversity in the laws of the several states concerning trust companies which do not engage in commercial banking. This might leave a loophole for avoidance of the limitation on investments by any holding company which had the foresight to acquire, prior to the effective date of the act, a trust company in some one of the forty-eight states whose powers were broad enough to suit its purposes. Such a development would be further encouraged by another section which amends the Investment Company Act of 1940 to exclude from the definition of "investment company" any "banking subsidiary" of a bank holding company. The Investment Company Act itself exempts banks, but to prevent evasion, it defines "bank" to cover a banking institution outside the Federal Reserve System only if it meets three tests: (1) that a substantial portion of its business consists of re-

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7. Section 708 of the Defense Production Act of 1950, 50 U.S.C. App. 2158, exempts from the antitrust laws action taken pursuant to voluntary agreements made with the approval of the President by "representatives of industry, business financing, agriculture, labor and other interests" to further the objectives of the Act. Under this provision a "Program for Voluntary Credit Restraint" by banks has been approved, 16 Fed. Reg. 2372. Since the Act refers to every segment of the economy, it apparently was designed to allay all fears of antitrust suits, whether well-founded or not.

ceiving deposits or exercising fiduciary powers; (2) that it is examined and supervised by a state or federal authority having supervision over banks; and (3) that it is not operated for the purpose of evading the Act. Only companies which do not fulfill the foregoing conditions would be benefited by the further exemption of "any banking subsidiary" of a holding company. The reasons for treating such institutions as banks and exempting them from the Investment Company Act are obscure.

Here again, the provisions of the Robertson Bill are simpler and offer fewer opportunities for evasion. Broadly speaking, holding companies, other than those which are banks of deposit, would be forbidden to acquire or retain shares in nonbanking organizations after five years. All holding companies would be required to limit their activities to banking or managing or controlling banks, after that period.

Under either bill it is clearly contemplated that a holding company might distribute its proscribed securities, or shares of a new corporation organized to receive them, to its stockholders. How much the actual control of the enterprise would be changed by this procedure is conjectural. Interlocking directorates are not prohibited. Nor are the stockholders of the holding company prevented from creating voting trusts for the shares distributed to them. Indeed, under the Board's bill, any arrangement whereby the holding company itself was given the power to vote the shares without actual ownership might be unassailable. In contrast with the phrase "directly or indirectly owns, controls or holds with power to vote", used in defining a bank holding company, the bill merely makes it unlawful for a holding company to "own" certain securities. The Board might find it difficult to convince a court that the word "own" should be interpreted as broadly as the more elaborate phraseology used earlier.

Board Would Require Reports To Insure Compliance

To insure compliance, the Board would require every holding company to register and file reports. Each such company and its subsidiaries would be subject to examination, and terms of management or service contracts between it and its subsidiary banks would be reviewable by the Board. Violations of the act would be punishable as crimes, as well as by administrative penalties. Every Board action would be subject to judicial review, with the limitation that the Agency's findings of fact should be conclusive if supported by substantial evidence. The Robertson Bill would impose criminal penalties for infractions of the law, but it makes no provision for registration, reports, examination or administrative sanctions. Judicial review would be governed by the general provisions of the Administrative Procedure Act. Neither bill gives the supervisory authorities the right to institute civil judicial proceedings to prevent violation or compel compliance with the act.

Both bills would permit a holding company to distribute to its stockholders without recognition of gain "property not permitted to be owned by a bank holding company", or stock of a new company organized to receive such property. This does not apply to a distribution of bank stock even if made to divorce ownership of such stock from unrelated investments or activities. For a company engaged in other business which finds itself classified as a bank holding company, distribution of its bank stock might be the only feasible method of complying with the law. Such a situation would be unlikely to arise under the narrower definition of holding companies contained in the Robertson bill, but if the definition is to cover an unknown number of smaller institutions, this point deserves consideration.

With the added responsibilities borne by the banking system under the defense program, effective regulation of bank holding companies has become more important than ever. What is needed is a tightly drawn statute embodying the best features of both the measures which have been put forward, and stronger in some respects than either, to curb large organizations without unnecessary hardship to smaller ones. To deter oppressive action, there should be more precise definitions of administrative powers, coupled with adequate judicial review, rather than dispersion of supervisory responsibility. No agency should have untrammeled discretion to ignore or apply the antitrust laws as it sees fit. Without an explicit legislative mandate as to whether or to what extent those laws should govern bank holding companies, any legislation on the subject might produce more mischief than it would remedy.

Erratum

■ Delbridge L. Gibbs, of Jacksonville, Florida, calls our attention to an error in the report of *Staedler* v. *Staedler* in our Courts, Departments and Agencies department on page 377 of the May issue of the JOURNAL. The Florida residence requirement for divorce is therein stated to be thirty days instead of ninety as provided by §65.02, Florida Statutes, 1949.

How To Amend the United Nations Charter:

A Proposal for Strengthening World Law

by **Thomas Raeburn White** • of the Pennsylvania Bar (Philadelphia)

■ Mr. White points out that the processes for amending the Charter of the United Nations in the manner provided in that document are useless because they require the approval of all the permanent members of the Security Council. He suggests that a new convention be called to draw up a new world charter, either at the invitation of the General Assembly or of one or more of the leading states. The suggestion may remind some of the proposal of former President Hoover, who expressed himself in favor of throwing the United Nations overboard and starting a new federation of nations in the Western world. Mr. White's approach leads in the same direction, though diplomatically it falls more into the pattern set by the Fathers of our own Constitution, who permitted the Articles of Confederation to remain alive until the new government was formed.

■ The interesting articles by Judge Wilkin in the January and February numbers of the JOURNAL rightly stress the necessity for establishing "the sovereignty of law" in the field of international relations and very sensibly recognize that the authority given to any world government must be limited. The particular question now before us is how we can obtain this objective. There can be no doubt that the line of least resistance is to proceed through the United Nations in view of the fact that it is already in existence and practically all nations of the world are members of it. Its influence and authority have been steadily increasing but it is greatly handicapped, as everyone recognizes, by the limitations on the power of the Security Council, and many suggestions have been made whereby these limitations may be removed or restricted. Proposals to amend the Charter of the United Nations have been put aside because the Charter itself provides that an amendment may only become effective if consented to by the five principal powers, members of the Security Council, thus subjecting amendments to the veto which has caused so much difficulty in the past.

The purpose of this article is to suggest that the Charter may be amended by a new conference, without regard to the method prescribed in the Charter, by applying principles of American constitutional law, which are now generally accepted throughout the world. The supreme power of a nation under the American theory resides in the body of the people, always remains there and may be called into activity whenever the people in a legal manner provide for changing their fundamental law, which is embodied in their constitution. Thus in several of the states the people, when they became dissatisfied with the constitution, have called a convention, acting through their legislative body, to amend the constitution or propose a new one. That in so doing the convention is not limited to the method of amendment contained in the preceding constitution is well settled. See for example the cases of *Wells* v. *Bain*[1] and *Wood's Appeal*,[2] in which the Constitution of Pennsylvania was decreed to be legally adopted although the method prescribed in the preceding constitution was not followed. Another illustration is the adoption of the Constitution of the United States by a method which did not follow the directions for amending the Articles of Confederation which were contained in those Articles. Although the Constitution was immediately effective only as to the states which adopted it, its momentum was so great that all others adhered to it without much delay.

The American theory was not fully understood at first by European jurists, and Dicey in his *Law of the Constitution*[3] expresses the opinion that it would be very difficult to arouse the power of the people residing in a great multitude (which power he refers to as the "monarch") so as to change the constitution if need arose. He says this monarch "slumbers and sleeps" and is not like the English Parliament, an ever wakeful legislator. Subsequent

1. 75 Pa. 39.
2. 75 Pa. 59.
3. *Law of the Constitution*, 6th Ed., page 73.

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history has demonstrated that he was wrong in his conception that amendments to our constitutions would be so difficult to make but his comments are an interesting recognition that supreme power may reside in the body of a community.

Nations of the World Constitute a Community

Applying this theory, it is suggested that we can properly consider the independent nations of the world as constituting a community, and by analogy to the American doctrine, we can conceive of a "monarch" residing in the body of this community, by which, of course, is meant the power of the community as a whole. That the nations of the earth do constitute a community which has certain responsibility for preserving order has been more and more recognized. Even in very early times Grotius emphasized the power and duty of sovereign powers "to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations done to other states and subjects".[4] Wheaton says that Wolf deduces the obligations of the "voluntary law" of nations "from the fiction of a great republic instituted by nature herself, and of which all the nations of the world are members".[5] These references are interesting as showing that some of the early writers on international law recognized the existence of a society of nations which they conceived to be in some measure responsible for enforcement of the "natural law" of nations.

Modern writers have been more definite in declaring that a community of nations exists, as shown by the publication called "The International Law of the Future", prepared under the general supervision of Professor Manley O. Hudson of Harvard. Professor Hudson in an address to the American Society of International Law[6] repeatedly refers to the "community of nations". He says: "It would seem possible therefore for us to proceed on the hypothesis that the United Nations exists in the world today not as an exclusive club which concerns only its actual members but as a much broader institution which in many respects is to be identified with the whole community of states".[7]

That a duty rests upon the community of states to devise and enforce methods which would better preserve the peace of the world is clearly recognized by international congresses which have been held, among which may be mentioned the Congress of Vienna (1815), the first Hague Conference (1899), and the second Hague Conference (1907), and by the formation of the League of Nations at the close of World War I, and the organization of the United Nations at the end of World War II. This increasing recognition of responsibility naturally leads to the conception that there is a supreme power residing in the body of the community of nations which can make and enforce rules of law between them.

Adopting Mr. Dicey's suggestion that this power may be referred to as the "monarch", who "slumbers and sleeps", it may be suggested that he stirred in his sleep when the first Hague Conference was held, again at the time of the second Hague Conference and at the time of the adoption of the Covenant of the League of Nations. However, it would seem that he did not awake to full consciousness until the time of the San Francisco conference, but even then he had not fully shaken off the handicap of drowsiness for he did not realize when he established organs for the enforcement of his will that the organs he set up were inadequate for the purpose.

Sovereign Power May Amend Charter As It Sees Fit

However, the question now before us is whether this monarch cannot amend the charter or constitution which he laid down at San Francisco without following the methods set forth in the Charter itself. It would seem hardly open to doubt that a monarch who could make a charter could amend it and that he is not prevented from doing so by reason of some previous pronouncement he has made. To put the matter differently, it would seem reasonable to conclude that the sovereign power of the community of nations is not to be restrained from amending the Charter in any manner it sees fit, notwithstanding the fact that a different method is provided in the Charter. The references previously made sustain this view.

Convention of United Nations Could Make Fundamental Laws

As the power residing in the body of the people of a state can be exercised in any manner in which it can legally be called into action, the same may be said of the sovereign power residing in the body of the community of nations. When a new constitutional convention is called in a state, it is necessary for the people to act through their legislature, for

4. *Rights of War and Peace* (Universal Classics Library Ed.) 247.
5. Wheaton, *International Law* (8th ed.) Paragraph 9.
6. *Proceedings American Society of International Law* (1950) page 38 *et seq.*
7. *Proceedings American Society of International Law* (1950) page 38 *et seq.*

this is the only way in which they can express their will, but when a new conference or convention is to be called to amend an international constitution such as the Charter of the United Nations, a conference can be assembled merely by inviting all members of the United Nations or indeed all independent states to send delegates to it. Legislative action is not necessary in view of the fact that the members of the community of nations are not numerous and all can be invited. The invitation could be extended by the General Assembly of the United Nations or by one or more states and if this convention or conference were attended by representatives of the great majority of states, all having been invited to participate, the result of their deliberations upon the principles above recited might properly be accepted, when ratified by the designated number of states, as the fundamental law of the community of nations. The conclusions of such a conference would have more weight than multilateral treaties which are recognized as one method of developing international law.

It is suggested that this is the simplest and indeed the most effective way to proceed to amend the Charter, and the one most likely to be successful. Even if one or several of the states concerned should decline to attend the conference or should deny its legality, this would not change the result. If the sovereign power of the community of nations decides that the amended charter shall control the action of states in the future, there is no authority to overrule its decision. If it be suggested that such procedure would arouse antagonisms, as it would no doubt when proposed in certain quarters of the world, these antagonisms would be much less than would be occasioned if a nation were excluded from the organization as has been proposed or a conflict were precipitated involving the use of force. It is scarcely to be doubted that in the course of time all the nations not originally assenting to the amended constitution or charter would ultimately agree to be bound thereby and thus become law-abiding members of the community of nations.

It is not the purpose of this article to suggest just what amendments to the Charter should be made, but obviously the rules for voting by the Security Council should be altered so that in matters relating to the preservation of peace a majority vote, or a two-thirds vote, should be effective without any right of effective veto by any one nation. A similar rule might be made with respect to other matters such as the admission of new members. The General Assembly might be given more power, particularly in the matter of developing rules of international law.

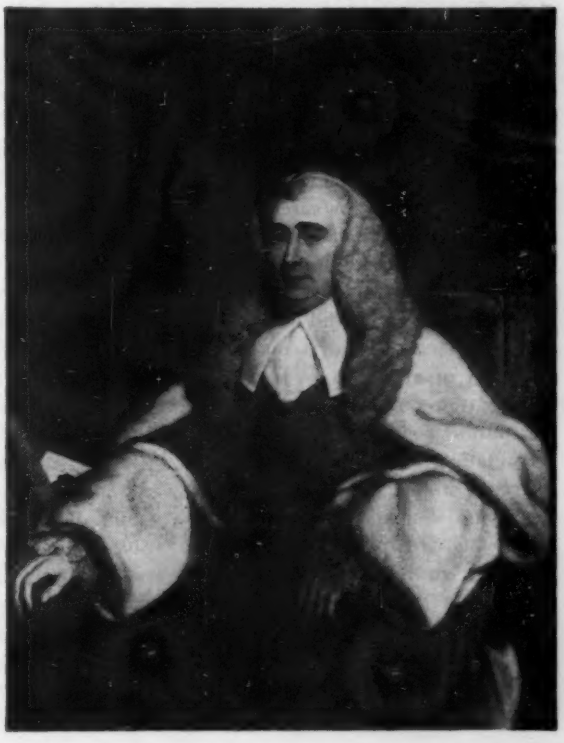
That changes of this kind would be an advance can scarcely be questioned, and they can readily be made, whereas the formation of a world government, with its problems of the basis of representation in a world parliament, the powers to be given to that parliament or to a world executive, would for any foreseeable time be insoluble.

■ This portrait of Chief Justice Gordon, of South Carolina, is the only painting known to exist in England of a chief justice of one of the Thirteen Colonies.

Gordon was appointed Chief Justice of South Carolina in 1771. He was graduated from the University of Glasgow in 1746 and was a student in the Middle Temple in 1747. In 1755 he was called to the Bar at King's Inns, Dublin. During the Revolution he was a Loyalist and was consequently forced to leave the colonies in 1775. He died in Ireland in 1796.

The painting is now in the possession of R. A. Riches, Bar Librarian at the Royal Courts of Justice. Gordon's collar, as shown in the painting, is of particular interest because it apparently indicates that chief justices of the American colonies wore the SS (for Saint Simplicius) collar as the emblem of their office. This collar was originally worn by the three chief justices of the common law courts in England and, since the Middle Ages, is part of the traditional robes worn by the Lord Chief Justice of England.

This information and the photograph of the painting were sent to the *Journal* by Mr. Riches.



The Supreme Court and the Loyalty Program: The Effect of *Refugee Committee* v. *McGrath*

by Pat McCarran • United States Senator from Nevada

■ In this article, Senator McCarran attempts to clarify the issues involved in the Supreme Court's April 30 decision of *Joint Anti-Fascist Refugee Committee* v. *McGrath*. He declares that the Court's decision, involving the Attorney General's list of subversive organizations, has been widely misinterpreted in the press. He takes the position that the Court's holding was a very narrow one, determining in effect merely that the Committee, which was disputing the Attorney General's right to include it on his list of subversive organizations, is "entitled to an opportunity to substantiate the allegations stated in its complaint, *i.e.*, to have the case tried on its facts". There is no basis, he says, for interpreting the ruling as a holding that the Loyalty Program itself is unconstitutional.

■ Confusion may not be a necessary incident of judicial prolixity, but neither is it an unknown consequence. More often, however, misunderstanding is attributable to inattention as the growing complexity of modern life progressively forecloses opportunity for careful study of important judicial pronouncements as well as the other important developments of the day.

Editorial writers and columnists valiantly seek to overcome this diffusion of attention by capsuling information on these developments for public consumption. Their interpretation of the doctrines and effects of important Supreme Court decisions seems to be constantly improving in quality and in its approach to correctness and there seems no reason to anticipate that this improvement will not continue indefinitely.

However, it sometimes occurs that the gentlemen of the press are confused by a judicial enunciation, perhaps because of its prolixity. In such a situation it is an interesting speculation whether their misunderstanding engenders or merely reflects public confusion. Of course, those who gain their only knowledge of a decision from confused, inaccurate or distorted newspaper reports or analyses cannot escape some confusion in their own minds. Unfortunately, their number includes at least some lawyers who are too busy to read the case and must therefore depend upon their daily newspaper for a report of the decision.

When such a situation develops and particularly if an important ruling of our highest court is involved, the comments born out of reaction serve only to spread misapprehension concerning the true import of the decision. It is in such circumstances that the Bar has a notable opportunity to perform a worthy public service in combatting the public misapprehension. But this requires, of course, that our lawyers first inform themselves fully and accurately.

Loyalty List Case Shows Confusion

In the brief period following the decision of the Supreme Court in *Joint Anti-Fascist Refugee Committee* v. *McGrath, Attorney General*,[1] much press and radio comment in public and even some semiofficial comment, in private, have indicated considerable confusion as to the exact result effected by that decision.

This case concerns the Government's Loyalty Program. It comes at a time when internal security problems are attaining ever-increasing importance. As lawyers, therefore, we are justified in seeking to learn and to make known the true import of the decision reached by the Supreme Court.

Our task is complicated somewhat by the fact that five separate and

1. 19 U. S. Law Week 4232 (April 30, 1951). This decision also comprises *National Council of American Soviet Friendship, Inc.* v. *McGrath, Attorney General* and *International Workers Order, Inc.* and *Arthur Lowndes Drayton* v. *McGrath, Attorney General*; these three cases arose separately but were consolidated for hearing before the Supreme Court. However, insofar as this article is concerned reference to the Joint Anti-Facist Refugee Committee is intended to refer generally to all the petitioners, since the facts and the issue raised in the several cases are substantially the same.

diverse opinions were written by the five Justices comprising the majority of the Court.[2]

To obtain perspective for consideration of this decision we must, therefore, briefly review the background of the case. On March 21, 1947, the President promulgated Executive Order 9835[3] which, culminating earlier but generally ineffective efforts to prevent disloyal persons from either obtaining or retaining Government employment, directed a loyalty investigation of every person employed by or entering the employment of any department or agency of the Executive Branch of the Federal Government. This order recited that it was based upon authority vested in the President by the Constitution and legislation,[4] and upon the authority of the President as Chief Executive of the United States, in the interests of the internal management of the Government. It provided for the establishment of the Loyalty Review Board, within the Civil Service Commission, to supervise and co-ordinate the loyalty program and to hear appeals emanating from subordinate loyalty boards of the employing department or agency.

Part III, Section 3, of the Executive Order provided as follows:

> 3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.
>
> a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

By letter of November 24, 1947, which was disseminated to all the executive departments and agencies, the Attorney General furnished the Loyalty Review Board with a list of subversive organizations pursuant to Part III, Section 3, of Executive Order 9835. This list included a designation of the Joint Anti-Fascist Refugee Committee.[5]

Subsequently the Joint Anti-Fascist Refugee Committee filed a suit in the United States District Court for the District of Columbia primarily to have Executive Order 9835 declared unconstitutional as applied against that organization. The relief sought by complainant was to have its name deleted from the allegedly unconstitutionally created list because of the obvious harm to the activities of the Joint Anti-Fascist Refugee Committee by reason of its designation by the Attorney General as "subversive" and "communist". The complaint described the Joint Anti-Fascist Refugee Committee as a charitable organization engaged in relief work and generally implied an attitude of co-operation and helpfulness, rather than one of hostility or disloyalty, on the part of the organization toward the United States, although the complaint did not state an express denial that the Refugee Committee is subject to the designation made by the Attorney General.

The District Court granted defendant's motion to dismiss the complaint for its failure to state a claim upon which relief could be granted, and denied the complainant's motion for a preliminary injunction, without opinion, on June 4, 1948. The United States Court of Appeals for the District of Columbia Circuit affirmed the order of dismissal, one judge dissenting.[6] The Supreme Court granted *certiorari* because of the importance of the issues and their relation to the Government's Loyalty Program.[7]

Issue Decided by Court Was Very Narrow

It is essential, then, to note that the sole issue before the Supreme Court, raised by the dismissal of the complaint for failure to state a cause of action upon which relief could be granted, was whether, *in the face of the facts alleged in the complaint and therefore admitted by the motion to dismiss*, the Attorney General of the United States had authority to include the complaining organization in a list of organizations designated by him as "subversive" and "communist" and furnished by him to the Loyalty Review Board of the Civil Service Commission. This issue was decided in the negative and the Supreme Court merely ruled that the case should be remanded to the District Court with instructions to deny respondent's motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

To state the matter more simply, the Supreme Court held only that the petitioner was entitled to an opportunity to substantiate the allegations stated in its complaint, *i.e.*, to have the case tried on its facts.

This holding leaves open the clear possibility that the District Court may find that the Attorney General's listing of that organization as "subversive" and "communist" was justified on the facts and was neither arbitrary nor capricious nor unreasonable in the light of the procedure actually followed in making

2. The controlling opinion was written by Mr. Justice Burton, joined only by Mr. Justice Douglas who also wrote a concurring opinion. Individual opinions were presented by Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Jackson, all of whom agreed with the result of the controlling opinion but on different grounds. In addition, Mr. Justice Reed wrote a dissenting opinion, with the concurrence of the Chief Justice and Mr. Justice Minton.

3. 12 Fed. Reg. 1935 (1947), 3 Code Fed. Regs. 129 (Supp. 1947), 5 U.S.C.A. § 631 note.

4. Specifically including the Civil Service Act of 1883, 22 Stat. 403, as amended, and Section 9A of the Hatch Act, approved August 2, 1939, 53 Stat. 1148, 18 U.S.C. § 61i (1946), now 5 U.S.C. § 118j (1946, Supp. III).

5. Several months later, on September 17, 1948, the Attorney General furnished the Loyalty Review Board with a consolidated list containing the names of all the organizations designated by him as within Executive Order 9835, segregated according to the classifications enumerated in Part III, Section 3 of the Order, on the basis of dominant characteristics; each of the three organizations involved herein were classified in this consolidated list as "Communist". See 13 Fed. Reg. 6137-8, 5 Code Fed. Regs. c. II, Pt. 210, pages 203-5 (1949).

6. *Joint Anti-Fascist Refugee Committee v. Clark, Attorney General*, 85 U. S. App. D.C. 255, 177 F. (2d) 79 (1949).

7. *Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General*, 339 U. S. 910 (1950).

the determination resulting in that designation.

The ruling of the Supreme Court in this case does not produce the result, contrary to the expressions or the implications contained in various commentaries on the decision, that the Government's loyalty program must be "scrapped" nor does it mean that revision is compulsory for the procedure followed by the Attorney General in listing subversive organizations pursuant to the mandate of Executive Order 9835.

Certain language appears in the controlling opinion written by Mr. Justice Burton which would tend to indicate a determination that the Attorney General acted outside the scope of his authority, under Executive Order 9835, in designating the Committee as "communist". But such language must be considered in context and in close connection with the posture of the case, since it has reference only to the fact that the Attorney General chose to meet the complaint with a motion to dismiss, thereby necessitating, in the appellate proceedings, acceptance of the allegations in the complaint at face value.

The Executive Order giving rise to the designation of subversive organizations contains the express requirement that such designation by the Attorney General shall be made after an "appropriate investigation and determination", which patently precludes arbitrary action in the listing procedure. Nevertheless, the Attorney General's election to proceed against the complaint with a motion to dismiss, while successful in the lower courts, placed him in the technical position of claiming authority under the Executive Order to designate the Refugee Committee as "subversive" and "communist" upon the very facts, clearly contradictory to such designation, alleged by the Refugee Committee in its complaint. In the view of Mr. Justice Burton this was overstraining the authority of the Executive since, he said, it amounted to an assertion of presidential authority to designate an organization as "communist" at the option of the Attorney General without reliance upon either disclosed or undisclosed facts supplying a reasonable basis for the determination. It follows naturally, therefore, that the mandate of the Court in fact strikes at omission in the procedural action within the judicial proceeding instituted by the Refugee Committee, rather than omission in the administrative action of the Attorney General as it applies to the Refugee Committee, upon undisclosed facts in his possession, pursuant to the Executive Order.

Actually, the precise question involved does not appear to have been whether the President had the authority to authorize the Attorney General, acting in the capacity of an adviser to him, arbitrarily to list an organization as subversive. The question was whether the Attorney General could plead, as justification for an arbitrary designation, an Executive Order requiring him to make such designation after "appropriate investigation and determination".

If Congress, by law, should require the Attorney General to file an annual or quarterly report listing all organizations which in his opinion, on the basis of facts available to him, are subversive, it is doubtful whether anyone would contend that an abuse of power was involved or that the Attorney General would have to resort to administrative hearings before including any organization in the list to be reported to Congress. It would seem that the Chief Executive should have as much right as Congress to require a report or other advice from his chief legal adviser.

Subversive Designation Serves Only To Implement Loyalty Program

The directive in Executive Order 9835 giving rise to the Attorney General's designation of subversive organizations is subordinate to the main purpose of the order requiring loyalty investigations of federal employees and only serves to implement that main purpose. Part V of the order sets up certain standards to be used for the refusal of employment or the removal from employment in an Executive Department or agency on grounds relating to loyalty. Section 1.f. of Part V provides as follows:

> Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

The President and the Attorney General have made it plain that membership or affiliation with an organization that is designated as subversive is simply one piece of evidence to be considered in determining the loyalty of a particular employee.[8]

Since Executive Order 9835 has paramount application to the individual employee it is a logical consequence that consideration of the employee dominantly affects consideration of an organization's contest of its rights following its designation as subversive by the Attorney General pursuant to Executive Order 9835. Significantly, on the same day that the *Joint Anti-Fascist Refugee Committee* case was decided, the Supreme Court decided a case involving an individual who had been denied federal employment on the ground that she was a poor security risk, within the purview of Executive Order 9835. Additional perspective for

8. In a directive to the various loyalty boards, published on March 20, 1948, Seth W. Richardson, then Chairman of the Loyalty Review Board, said: "In connection with the designation of these organizations, the Attorney General has pointed out, as the President had done previously, that it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with, or sympathetic association with, any organization designated is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. 'Guilt by association' has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual is disloyal. That must be the guide." 13 Fed. Reg. 1471-3, 5 Code Fed. Regs. § 210.15, App. A (1949).

consideration of the decision in the former case may be gained by reference to that individual's case.

Dorothy Bailey, the individual referred to, was a former Government employee who was in the process of being re-employed in a federal agency when her application was denied after the agency's loyalty board determined that she was a poor security risk, largely upon the ground that she had been accused of membership in various subversive organizations. She denied these accusations in writing and under oath before the loyalty board. The Government's case was supported by unsworn testimony and Miss Bailey was afforded no opportunity to confront the witnesses against her. Upon appeal to the Loyalty Review Board the original ruling was affirmed, and she then brought a civil action in the United States District Court for the District of Columbia for a declaratory judgment and an order directing her reinstatement, contending, *inter alia*, that her dismissal was unconstitutional. The District Court found that the action taken by the loyalty board was constitutional. Miss Bailey then appealed to the United States Court of Appeals for the District of Columbia Circuit, where it was held (one judge dissenting) that the President has constitutional power, in the absence of congressional restriction, summarily to remove from Government service any person of whose loyalty he is not completely convinced.[9] The Supreme Court granted *certiorari*, and on April 30, 1951, the Chief Justice announced a *per curiam* order[10] affirming the judgment of the lower court by an equal division of the Court. (Mr. Justice Clark took no part in either of the cases under discussion by reason of his service as Attorney General when both cases arose.)

The action of the Supreme Court in the *Bailey* case leaves standing as the controlling summation of the law in that case a searching opinion written for the Court of Appeals by Judge E. Barrett Prettyman. In that opinion the basic issue is defined at the outset in this manner:

> The presentation of appellant's contentions is impressive. Each detail of the trial which she unquestionably did not get is depicted separately, in a mounting cumulation into analogies to the Dreyfus case and the Nazi judicial process. Thus, a picture of a simple black-and-white fact—that appellant did not get a trial in the judicial sense—is drawn in bold and appealing colors. But the question is not whether she had a trial. The question is whether she should have had one.

Therein lies the crux of the whole matter. The problem of loyalty and loyalty investigation is an extremely difficult one, and it is replete with side issues that tend to obscure the main issue, particularly because of our historic insistence upon due process of law for the protection of civil rights. But due process as a protective mechanism implies a deprivation, necessarily, and where there has been no deprivation of a civil right the assertion of the right to due process is obviously unfounded.

Executive May Discharge Employees Without Assigning Reason

Furthermore, it is well established that the Constitution reposes power in the Executive to discharge employees from the executive departments or agencies without assigning reason, in the absence of statutes.[11] Even those employees whose tenure is governed by statute can be removed for cause and it can hardly be doubted that disloyalty would constitute sufficient cause for their removal.

The Government, just as any other employer, is under no obligation to hire as an employee anyone who does not come up to certain standards, provided that the same basic standard is applied equally to all individuals.

The due process clause in the Constitution is aimed at protecting a person against deprivation of life, liberty or property without due process of law. However, it has been held repeatedly that "public offices are mere agencies or trusts, and not property as such", as stated in *Taylor and Marshall* v. *Beckham*, 178 U. S. 548, 577 (1900). Therefore, if the relationship of a public officer to the public is inconsistent with a property right, and since it is obviously inconsistent with the right to "life" or "liberty", as such, the due process clause does not apply to the removal of such officer from the public service.[12]

1912 Statute Assumes Government Employment Is Not a "Right"

The proposition that no one has an inherent or constitutional right to government employment, which is a privilege and not a matter of right, is embodied in the provisions of the Lloyd-LaFollette Act.[13] That act, which has been in uncontested effect since 1912, allows removal of a government employee within the classified Civil Service "for such cause as will promote the efficiency of such service" and provides expressly that no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer directing the removal.

In 1946 it was held that the Civil Service Commission could summarily dismiss, or refuse employment to, an individual whose loyalty to the United States was subject to reasonable doubt. This use of the Lloyd-LaFollette Act procedure was up-

(Continued on page 476)

9. *Bailey* v. *Richardson*, 86 U.S. App. D. C. 248, 182 F. (2d) 46 (1950).

10. 19 U. S. Law Week 3296 (April 30, 1951).

11. *Myers* v. *United States*, 272 U. S. 52 (1926).

12. Judge Prettyman examined this point in the *Bailey* opinion (*supra*, note 9) and continued in this manner: "Other considerations lead to the same conclusion. Never in our history has a Government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service. That record of a hundred and sixty years of Government administration is the sort of history which speaks with great force. It is pertinent to repeat in this connection that the Lloyd-LaFollette Act, sponsored and enacted by advocates of a merit classified government service, expressly denies the right to such a hearing. Moreover, in the acute and sometimes bitter historic hundred-year contest over the wholesale summary dismissal of Government employees, there seems never to have been a claim that, absent congressional limitation, the President was without constitutional power to dismiss without notice, hearing or evidence; except for the question as to officials appointed with the advice and consent of the Senate." 182 F. (2d) 46, 57.

13. 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948), 5 U.S.C. § 652 (1946, Supp. III).

Law Center Dedication and Regional Meeting

Combine To Make Dallas' Law Week

■ One of the greatest galaxies of legal minds ever assembled paid Dallas and the Southwestern Legal Center a visit April 16-21, for what may be one of the longest sustained bar association meetings in history.

The occasion was a four-ring legal circus which led off with the Southwestern Regional Convention of the American Bar Association, followed by the dedication of the Southwestern Legal Center (the first of its kind completed and in operation in the country), other activities of Lawyers Week and the twenty-fifth anniversary of the Southern Methodist University School of Law.

Exceeding even the boastful estimates of the planners, 1255 registrants and some 500 wives were counted, including representatives of all but a half-dozen states, three foreign countries and a liberal sprinkling of businessmen. These in addition to the élite of the American Bar.

Ringmaster was R. G. Storey, member of the American Bar Association's Board of Governors, Dean of the Southern Methodist University Law School and creator of the Legal Center which rose from an idea and a barren five acres to the magnificent law quadrangle standing today on the northwest corner of the SMU campus.

Mr. Storey's brilliant leadership brought two United States Supreme Court Justices, a popular champion of the American Bench, an Assistant Secretary of State, the Chairman of the Atomic Energy Commission, a Latin American diplomat, two top hands among the Air Force brass, a famed editor and several outstanding business leaders to the podia of the Legal Center sessions.

Practically the entire official family of the American Bar Association were on hand, from President Cody Fowler, other officers, governors and important committee members, on down. The 140 speakers included three past presidents of the American Bar Association and President-Nominee, Howard L. Barkdull. Prominent jurists were there in strength from all over the country, as well as renowned legal specialists, practitioners and educators.

As one newspaperman was heard to exclaim, "Isn't there a common garden variety of lawyer at this shindig?"

Harmonious collaborators for the affair were the American Bar Association, the Southwestern Legal Foundation and the State Bar Associations of New Mexico, Oklahoma, Arkansas, Louisiana and Texas. Their presidents had important

An "Aerial View", Legal Center Quadrangle

roles in the planning and program also.

In the opening days, the hundreds of lawyers were dramatically exposed to the synchronized machinery of the American Bar Association, many seeing the Association bodies at work for the first time. The popularity of the five Section meetings alone justified the American Bar's participation and proved that the workaday lawyer, who was there in numbers after all, has a natural curiosity in the official bar agency devoted to his primary field of interest.

While top names of Bar, Bench and business doled out timely and inspirational messages during the major forums, the workshop institutes attracted sincere audiences to absorb the sensible solutions to everyday professional problems as they were related by authorities of national reputations.

The climax of the week occurred on the afternoon of April 18, as the Southwestern Legal Center was dedicated amid the resplendence of robes, mortar boards, flaming stoles and tassels of a full academic procession. The ceremonies were punctuated by a profound address by Chief Justice Arthur T. Vanderbilt of the Supreme Court of New Jersey, and significant remarks by representative members of the profession and business. An open house at the Center itself followed the formal dedicatory rites.

The same evening some 750 lawyers and wives overflowed one of Dallas' largest banquet rooms to hear Associate Justice Robert H. Jackson —and to eat boneless breast of smoked pheasant.

The following evening a packed audience was charmed by the whimsical philosophy of the popular U. S. District Judge Harold R. Medina.

Significant sessions were scattered throughout the week. The Conference of Bar Presidents and Officials on American and World Affairs presented Mr. Barkdull, Association Secretary Joseph D. Stecher, Major General Reginald C. Harmon, Judge Advocate General of the Air Force; Major General C. P. Cabell, Director of Intelligence of the Air Force; and Associate Justice Tom Clark of the United States Supreme Court.

Tom W. Collins

Judge Harold R. Medina, United States District Court, Southern District of New York; Associate Justice Tom C. Clark, Supreme Court of the United States; Dean Robert G. Storey; Chief Justice Arthur T. Vanderbilt of New Jersey; Associate Justice Robert H. Jackson, Supreme Court of the United States, at dedication of Southwestern Legal Center, April 18, 1951.

A Conference of Business and Professional Leaders heard provocative addresses by Carrol M. Shanks, President of Prudential Insurance Co. of America; Herbert S. Thatcher, General Counsel of the American Federation of Labor; and Hatton W. Sumners, former chairman of the Judiciary Committee of the Federal House of Representatives.

So adaptable was the program that the conferees sat in mute absorption during General MacArthur's stirring message to the Joint Session of Congress through a special rigging of radio and the public address system. In the afternoon, a soul-searching declamation by Henry R. Luce, editor-in-chief of *Time, Life* and *Fortune*, received notable attention.

An Institute on International Law and Relations, April 20, also found ready listeners. Frank E. Holman, former Association president; Dr. Antonio Quevedo, United Nations delegate from Ecuador; Gordon Dean, Chairman of the Atomic Energy Commission, and George C. McGhee, Assistant Secretary of State, were the speakers.

There were other gatherings to make demands on the registrants' time. Among them was a full round of Texas hospitality, which reached a pinnacle at an old-fashioned ranch party, with barbecue, a professional rodeo and square dancing. Some of the more illustrious guests received traditional Texas greetings in the form of ten-gallon Stetsons, the object of much comment for their blue-green color.

Allied legal organizations were ably represented and took part in the program. The American Judicature Society, the Council of the Survey of the Legal Profession and the Junior Bar Conference each had planned meetings, as well as various important American Bar Association committees. The American Law Student Association Regional Conference and the Phi Alpha Delta Conclave also met during the week.

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AMERICAN BAR ASSOCIATION

Journal

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ *New Blood*

Institutions, no matter what the ends are that they are created to meet, tend to become ends in themselves. The leaders of our Association have ever been mindful of this danger. They have recognized the possibility that its direction might fall into the hands of a self-seeking group far removed from the main current of the actual practice of the law and have tried to guard against that possibility. The function of our Assembly, for instance, is to obtain for our Association the participation of the journeyman lawyer in its councils.

From the standpoint of the journeyman lawyer, who attends alone, our Annual Meetings are not, however, perfect. At best a lawyer who is not a Delegate to the House alternates between days when he has nothing to do but sit on the sidelines of the House and days when the number of Section meetings that he wants to attend makes a three-ring circus look like a solo dance. If there is a way of making the Annual Meetings more attractive to the first-time attendant no one seems to have been able to think of it. Such defects as exist are probably inherent in what the Association is trying to do.

The Regional Meetings, however, suffer from none of these handicaps. They are proving to be ambassadors from the Association to the lawyers of the country. To Atlanta came 700 lawyers and to Dallas 1,000 lawyers and 200 law students. Many of these lawyers (200 at Atlanta) were nonmembers of the Association since all members of the Bar could participate on equal terms. Besides the nonmembers, there were full-fledged members of the Association who had never cared to try the experiment of investment in a trip to a distant Annual Meeting.

The groups were smaller than at the Annual Meetings, permitting the closer association that always comes with fewer members. The competition among Sections for attendance at their meetings was not so keen. Every lawyer at the meeting stood on an equal footing with every other lawyer at the meeting.

The wisdom of the plan was fully demonstrated. The novices were loud in their praise of the meetings. Many liked the opportunity to meet the lawyers from their part of the country. Many decided to make the pilgrimage to the next Annual Meeting with the group that they met at the Regional Meeting.

A new way has been found to keep the American Bar Association vigorous, progressive and representative.

■ *The Dead Hand*

With the recent adoption of the Twenty-Second Amendment, the present generation of Americans has exercised its reserved right to remodel the basic framework of our Federal Government. An argument constantly heard against changing the Constitution is that we should not tamper with this great document produced by the wisdom of the Founding Fathers. This reverence for the original architects of our Government assumes for them an infallibility that they would have been among the first to disclaim.

Thought-stultifying clichés like "the wisdom of the Founding Fathers" can become dangerous because they are blind guides if slavishly followed. If experience is truly the mother of wisdom, then our generation should be a wiser one than that of Washington and Jefferson, Franklin and Adams. We not only have the benefit of all that they knew and left to us, but we have the additional advantage of the fruitful experience of the years that lie between. It is our generation which is, in time and in truth, the older generation. Older people in any given generation, of course, have more experience than younger ones, but, as Bentham pointed out so well, preceding generations had less experience than ours.

Lawyers constantly act on this principle in the argument of cases. For example, in matters of proof, the more remote the evidence, the less reliable we lawyers expect it to be. Therefore reason and experience should be the criteria of our judgments, not blind acquiescence in ancient authority. Just as it is not good sense to reject the wisdom of our forefathers, neither is it wise to be enslaved by the dead hand of the past by obsequious ancestor-worship. Many of the problems of the present day will be more readily solved by a careful analysis of human nature than by antiquarian research into ancient history.

Lincoln advised us against following implicitly whatever our fathers did, saying: "To do so would be to discard all the lights of current experience—to reject all progress, all improvement." If we in our day are as

wise as the Founding Fathers were in theirs, this is one place where we can follow their policy. They fought successfully for the right of their generation to govern itself. Listen to what Founding Father Jefferson has to say on this point:

> Some men look at constitutions with sanctimonious reverence, and deem them like the ark of covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead. I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also that laws and constitutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.

We must never lose faith in the American ideal that each generation is independent of those preceding it and is equally capable of governing its own affairs. Our Constitution, as Chief Justice Marshall observed, was intended to endure for ages to come and to be adapted to the various crises of human affairs. It is only by endless accommodation to the new problems of life that our Constitution and our country can long endure.

■ *The Impact of the Manifesto*

[This editorial was the last contribution of the late David A. Simmons to the JOURNAL. It arrived in the JOURNAL office a few days before his untimely death March 24, 1951.]

Under the modest heading, "A Few Observations", an outstanding member of the California Bar "sounds off" on the trends in England and America during the last fifty years toward socialism and communism. Taking his text from the Communist Manifesto of 1848, he shows its impact on Victorian and post-Victorian society, and the means and methods used by socialists and laborites to bring about its ends.

The abolition of private property, the abolition of inheritance, and the elimination of the wealthy and even the well-to-do, are goals which are soon to be reached by Labor in England and are sought by their ideological counterparts here.

We suggest you read this article. It will certainly stimulate your thinking and that may suggest action.

Editorial — **From a Member of Our ADVISORY BOARD**

■ *The Roots of the Law*

The recent revival of interest shown in these columns and elsewhere in the origins of law has left an old argument measurably unsettled. This debate cannot be resolved to the satisfaction of anybody. The inevitable mixtures of realism and idealism in the laws of law-governed countries make it impossible to reach dogmatic conclusions entirely applicable to any place or any time. From the time of Moses men have been fascinated with the idea of a system of laws which would conform to the natural law, in the sense of being derived from the wholesome aspirations of informed conscience, and adopted by legislative bodies and courts as the foundation of their work. The precise line where idealism shades off into pragmatism is not often clear. Law is but community sentiment projected into behavior. Doubtless the current period is coming nearer to revealing the differences in the two directions which laws may take under the motives which prompt them than any other comparable period of legal history.

A Russian jurist recently really stated the issue, with the scolding arrogance so characteristic of the Communist techniques of statement. He explained that the Soviet Code is "based on a logical and consistent Materialism", whereas the laws of the "Bourgeois countries" are "sheer Idealism". "Hence arises", this writer correctly pointed out, "an irreconcilable difference between the two." It is not true that the roots of the American law are laid in "sheer Idealism". That in itself is an ideal which may never be achieved. Nor have the Russians been able to hold the line at "consistent Materialism", though they have come closer to it than any other people. But the differences in objectives have raised the two diverging courses to such clear view within the past two years that all the world can see.

Justice to an individual is no part of the objective of Russian law; only class advantage is important. Courts are weapons of the ruling class in the "classless" society, as are tanks, guns, guided missiles and man masses. The pagan leadership of Russia denies the existence of God, and of natural virtue, or the validity of conscience. By these standards and means they are expecting to subjugate the world. What to do with it? Use the new power for further subjugation, turning finally to barbarism.

On the other hand Thomas Jefferson truly translated the prevailing philosophy of his time in declaring it to be a "self-evident" truth that "all men are created equal, *that they are endowed by their Creator* . . . ." It was thought by most of the important thinkers of his day that moral ideals must be kept alive by the influence of government, if justice was to remain the end of law and ordered liberty the primary function of government. This has not always been easy. In many ways it has been hardest in the years of greatest material prosperity.

JACOB M. LASHLY

St. Louis, Missouri

THE PRESIDENT'S PAGE

Blakeslee Studio

CODY FOWLER

■ I thought May was to be a comparatively quiet month. However, representing our Association, along with the representatives of some two hundred other organizations, I attended the National Conference on the United States Foreign Policy held in the Department of State on May 2, 3 and 4. I was sent considerable literature to read before arriving in Washington. There were talks by experts on international questions each morning and afternoon. Some of the subjects were "Global Strategy", "The Foreign Economic Program", "Political and Psychological Factors in European Policy", "Near East and South Asian Problems", "The Far East", and "Review of Foreign Problems Facing the United States Today". All these subjects are of great current interest. Each speaker opened the meeting for questions and, without any apparent reluctance, frankly answered most of them. There were also round-table discussions in which both the experts and the visitors participated. All in all, it was a constructive conference and it gave me a more sympathetic understanding of the efforts of our State Department to arrive at intelligent and practical solutions of the many difficult problems with which it is faced.

Everyone attending was particularly impressed with the demonstration of the "Voice of America". That this program has proved worthwhile was evidenced by the results shown to us. Information obtained from persons behind the Iron Curtain and letters received indicate conclusively that messages from the Voice of America are getting through and are having a constructive effect.

It is pleasing to see a program so well received as this one.

While in Washington I appeared before the Judiciary Committee of the House of Representatives in favor of H. R. 1494, which provides for an increase in the salary of federal judges. The increased pay provided by this Bill was approved by the House of Delegates in February of 1949 and has been approved by many state and local associations. Its passage would serve to attract more of the type of men we want in the federal judiciary—successful and outstanding lawyers. In this time of increased living costs and the lessening of the value of the dollar, our judges must be adequately paid. There was never a time in our history when we needed better judges.

I also conferred with Senator Pat McCarran, chairman of the Judiciary Committee of the Senate, regarding not only the above-mentioned bill, but S. 16 which would provide an annuity for the widows of federal judges. It is impossible, with the present income taxes, for a judge to live as he should and yet save sufficient money to give security to his wife and family after his death.

I returned to Washington on May 13 for a conference with Section and committee chairmen and to attend the meeting of the Board of Governors, which was held May 14 and 15. Following this meeting I attended the annual meeting of the American Law Institute from May 16 to 19.

Some of the actions of the Board of Governors will be of particular interest to our members. I received a letter from a committee chairman of Congress inquiring into the views of our Association in connection with televising meetings of Congress and hearings of congressional committees, which, of course, would include such committees as the Kefauver and Fulbright committees. There has been a great deal of interest in the country in connection with this matter and also in the position of our Association on the televising of courtroom trials, hearings, judicial proceedings, etc. In connection with this subject, the Board of Governors passed the following resolution:

1. That the televising and broadcasting of judicial proceedings is clearly a matter of grave concern to the American Bar Association.

2. That while the propriety of televising and broadcasting the debates in the Congress and other legislative assemblies ordinarily rests with those bodies, the televising and broadcasting of legislative investigatory proceedings set up for the ascertainment of facts as a basis for legislation, legal prosecutions and other judicial proceedings are matters of concern to this Association.

3. That televising and broadcasting hearings and investigatory proceedings basic to or touching matters of law enforcement or for ultimate judicial consideration present questions of such grave implications to the cause of the administration of justice that the subject merits the serious attention of this Association.

I was authorized to appoint a committee of such size as was deemed expedient to carry out this action. It is my belief that this should be a committee of outstanding lawyers, some of whom, at least, should have a national reputation.

The Board also authorized its special committee to purchase property upon which could be erected a building to house the Headquarters Office of our Association. This was in accordance with the recommendations of the committee, who felt that a new building designed for the purpose would be more practical than the purchase of an old building. We hope to have something to report in the near future. There is great in-

terest among the lawyers in selecting a headquarters which will be practical and of which we can be justly proud.

In the meantime, in order to make room for Edward B. Love, the new Director of Activities, and his staff, and for other increased demands on space, temporary additional space has been obtained across the street from our Headquarters. This should relieve somewhat the crowded condition pending the building of a new home.

At the request of Charles E. Wilson, Director of the Office of Defense Mobilization, the Board of Governors authorized me to appoint a committee to cooperate in the work of the Office of Defense Mobilization. The details and functions of the committee have not been worked out and the committee has not been appointed. I am convinced that such a committee can render an effective service in these difficult times.

The next meeting of the Board of Governors will be held at the Waldorf-Astoria Hotel, New York City, on September 14, which makes me realize that my term is three-fourths over.

Membership applications are coming in at a satisfactory rate although increases indicate that most of our members are making no effort to obtain additional members. The work of our Association justifies the support of the thinking lawyers of our country. Let's extend an invitation to our friends.

After my visit to Washington, I spent several days in New York working with committees and then went to Chicago to spend two days in the Headquarters Office.

I attended the meeting of the New Jersey State Bar Association at Atlantic City on May 24, 25 and 26. As would be expected this was an outstanding meeting. Many questions were discussed with vigor and enthusiasm. My visit to this bar association meeting was a most enjoyable occasion for me.

The more bar association meetings I attend the more I am impressed with the increased interest and activity in connection with continuing legal education. Lawyers realize that it is necessary to continue to study if they are to keep abreast of the legal times.

Those interested in a winter vacation should take note of the very interesting meeting, the Seventh Conference of the Inter-American Bar Association, to be held in Montevideo, Uruguay, November 22—December 3. The Bar Association of Uruguay will be host to the lawyers of this hemisphere. They have arranged a most interesting program. The social events planned will be excellent and will include a reception by their President and another by their Supreme Court. Many attractive side trips will be arranged, not only in Uruguay, but at many points going and coming, including a trip to the beautiful and world-famous Chilean lake country. Local bar associations will be hosts to groups going either by plane or ship, and this will give them an additional opportunity to become acquainted with the various countries and their people. In my opinion, the greatest contribution that the Inter-American Bar Association has made has been the many friendships resulting from the mingling of lawyers of the various American countries with the resulting understanding that such relations naturally engender.

If you can make the trip and are interested in working while there, please let me know as a goodly number of delegates will be appointed.

Law Book Publishers Contribute to Regional Meetings

The Association is most grateful for the following generous contributions made to help defray expenses of regional meetings:

Commerce Clearing House, Inc. (for Atlanta and Dallas Meetings)	$ 500.00
Martindale-Hubbell (for Atlanta and Dallas Meetings)	500.00
West Publishing Company (for Atlanta meeting)	250.00
Total	$1,250.00

Survey of Metropolitan Courts: Detroit Area

by Ira W. Jayne and Maxine Boord Virtue

■ In this article, Judge Jayne, Presiding Judge of the Circuit Court of Wayne County, Michigan, and Mrs. Virtue, of the Kansas and Michigan Bars, tell of a survey made of the problems of metropolitan courts in the Detroit area. The survey disclosed that judicial administration in such areas is confronted with problems more complex and more difficult of solution than courts in simpler, more stable rural and small-town sections. This article is a summary of the findings of the survey.

■ More than half the people in the United States live in metropolitan districts and most who dwell outside are frequently in one or more metropolitan centers on business or personal errands. It is well known that the population grouping in a metropolis, and conditions of living there, cause social problems and pressures unlike those existing in any other environment. The organization of metropolitan trial courts, however, has received little attention. In considering court structure and administration, the general assumption is that any metropolitan court is well-organized if made part of a statewide hierarchy, related closely in form and procedure to its nonmetropolitan jurisdictional counterpart and provided with enough personnel to handle its caseload.

In 1947, the Section of Judicial Administration of the American Bar Association, through its Metropolitan Trial Courts Committee of which one of the present writers was then chairman, asked the University of Michigan Law School to investigate the question whether the problems of metropolitan trial courts differ either in substance or in extent from those of courts elsewhere so as to require a different kind of court organization for such courts and a system of intercourt integration within a metropolitan area. Professor Lewis M. Simes, Director of Legal Research at the University of Michigan, and his committee agreed to provide a first and basic research study in the nature of a detailed survey of the judicial organization of the Detroit area and the way in which it functions. With this as a pilot survey, undertaking only to depict and analyze the court system with a view to isolating and defining the metropolitan problem, it was thought that other studies in other such areas could readily be made and that the problems finally demonstrated to be common to all metropolitan courts could then be dealt with.

Monograph Presents Results of Two-Year Study

The committee was able to persuade Professor Emeritus Edson R. Sunderland of the law school, court-procedure expert and Secretary of the Judicial Council of the State of Michigan, to act as faculty sponsor of the enterprise. One of the present writers, employed for the purpose by the law school, conducted the survey and is the author of the two-hundred-fifty page monograph recently published jointly by the Michigan Legal Series and the Judicial Administration Section of the American Bar Association. This volume presents the results of a two-year study, based on a year of observation and interview, and another year of writing, rewriting and checking for factual accuracy. Statutory and case material, litigation files, and court statistics, as well as general bibliographical material, have been employed. The backbone of the study, however, is the direct and thorough investigation of the structure and practices of these courts in actual operation.

From the most significant findings, a few have been selected. The list presented below is not exhaustive and the intent here is merely to indicate the nature of some problems thought, from facts collected in this study, to be typically metropolitan court problems. The study itself contains the facts and analysis upon which each of the findings is based.

The size of a metropolitan court

caseload necessitates a large and extensively departmentalized court staff. During 1948, the period of the Detroit study, more than nine hundred persons were employed full time by courts operating in the City of Detroit. Each case passes through the hands of many persons during successive stages of court contact, so that the problems of insuring timely disposition of cases and of protecting quality of disposition are more difficult and of greater dimension than in nonmetropolitan tribunals. The development of elaborate machinery for handling dockets, of specialized calendars and divisions and of investigative and supervisory agencies within courts are causally related to the special metropolitan court problem of adequately controlling each unit of its caseload.

The multijudge court is predominantly if not exclusively a characteristic of the metropolis. The problems of judicial administration in such courts are thought to be unique. The administrative, executive, or presiding judge with a multijudge Bench, a large caseload and an extensive staff has complicated administrative duties demanding special skills and carefully planned facilities and equipment. Among his duties are assignment of cases, division of judicial labor, control of records and finances, and assembling of statistics and reports. The Detroit study describes in detail the extent of the use of presiding and executive judgeships in the various courts operating in Detroit, and various devices in use there for discharging judicial administrative functions. The use or disuse of such judges appears to vary with the skill of available judicial manpower, and to be intimately related to the efficiency of the entire tribunal.

Defective Court Jurisdiction Accompanies Metropolitanization

The development of a metropolitan area is accompanied by the creation of independent autonomous governmental units, with duplicating and conflicting authority over the same geographic area. The courts in the Detroit metropolitan district, like other portions of its governmental structure, exhibit the result of haphazard and unintegrated growth in the accumulation of many independent tribunals with overlapping, gapping and duplicating jurisdiction. There appears to be a tendency in such courts for the extensive use of specialized judgeships to result in the development of specialized and independent tribunals.

Population studies analyzed in this survey have demonstrated that the inhabitants of a metropolitan area are different from those who live elsewhere. The more ambitious, restless and unstable elements in the population gravitate toward metropolitan areas. The population in these areas is characterized by great density (there are over eleven thousand people per square mile in the City of Detroit), by mobility, and by what is called "centrifugal drift" —the tendency of stable family groups to move outside the metropolis, leaving the central city disproportionately inhabited by unstable and irresponsible elements.

There is more crime, per unit of population, in metropolitan areas than outside; there is more illegitimacy, irresponsible domestic behavior of various kinds and mental illness, per capita, than elsewhere. Due to the crowded yet anonymous conditions of metropolitan life, there is freedom from neighborhood standards of morality and freedom from fear of punishment which is directly reflected in certain kinds of antisocial behavior resulting in litigation.

Because of the character and behavior of the population it serves, the metropolitan court as such has a different kind of caseload. In it are disproportionately large numbers of mental cases, traffic cases, criminal offenses, habitual drunkenness and domestic relations cases.

"Social Problem" Cases Are Large Part of Courts' Work

Defective family relationships, reflected in court caseloads as divorce, illegitimacy, domestic assault and battery, nonsupport, and juvenile dependency, neglect, or delinquency (to name only a few categories) occur so often in the Detroit caseloads that the present writers estimate that more than half the total time of all courts operating in Detroit is spent in dealing with some aspect of the "social problem" cases. The brunt of this caseload is carried by the Circuit Court of Wayne County, the Chancery Division of which deals with illegitimacy and divorce, by the Recorder's Court of the City of Detroit, a specialized criminal tribunal having complete jurisdiction over all criminal offenses both petty and grave within the City of Detroit, and by the Juvenile Court of Wayne County.

The most notable development of a court administrative agency to handle domestic cases is the Friend of the Court of the Circuit Court of Wayne County, which now has over a hundred employees under the direction of a lawyer with extensive social service experience. This office collects all alimony and child support, prosecutes all delinquent husbands and fathers, whether or not the dependents have complained, and actively supervises the care and treatment of all illegitimate children or children of divorced persons under the jurisdiction of the court. Its new "Reconciliation Division" indicates that this agency has not yet attained its maximum growth.

The Psychopathic Clinic at Recorder's Court and the large probation departments at all three courts mentioned above are other examples of the extensive use by courts of their own staff facilities for diagnosing, investigating and supervising their "social problem" cases. The amount of family casework done by these agencies, and the amount of money, in family support and otherwise, collected by them, is a major point in the study.

Since defective family relationships may be manifested in several kinds of court contact, it is not surprising that the Detroit study finds great duplication and overlap among Detroit courts handling "social problem" cases. The duplication between

(Continued on page 462)

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Then came an age of critical realism, a liberalism that was humanitarian and constructive and imbued with a zeal for social justice, but which had its fringe of "intellectuals" devoted to the gradualism or creeping paralysis of an American Fabianism or consciously or unwittingly Communist. The disillusionment that followed World War I, an era of debunking biographies, the despair and sense of individual frustration during the Great Depression, utter gutter realism in literature, "realism" in the law, the degradation of man by Freudian and behavioristic psychology, attacks upon reason, had their corrosive effect. And then in a confused and revolutionary age Americans were suddenly confronted with appallingly complex problems of survival and of a world leadership thrust upon them by the rise of imperialist Communism and the breakdown of European and Asiatic barriers to its aggression. Gone was the glad confident morning of our national security and our manifest destiny.

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The major portion of the Dean's short book is devoted to an analysis of the Dean's definition of "Americanism". The basic tenet is stated on page 35: *"This official conjunction of the laws of God with the Constitutions and laws of the land is the basic and controlling ingredient of Americanism."* (Italics supplied.)

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tion of the laws of God with the constitutions and laws of the land" indicated.

Returning to the exception noted above, we find that the Constitution of the United States not only omitted all reference to the Deity, but specifically provided: "We, the people of the United States . . . do ordain and establish this Constitution for the United States of America," and "*This constitution,* and *the laws of the United States* which shall be made in pursuance thereof, and all *treaties* made or which shall be made, under the authority of the United States, *shall be the supreme law of the land;*" . . . "no religious test shall ever be required as a qualification to any office or public trust under the United States" (Article VI). The First Amendment, ratified in 1791, provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." (Italics supplied.)

During the administration of George Washington the Government of the United States solemnly declared in a treaty with a Mohammedan power: "as the government of the United States of America is not in any sense founded on the Christian religion. . . ." (8 Stat. 154, 155).

Dean Manion's other ingredients combining with this "official conjunction" of the laws of God with the constitutions and laws of the land to comprise Americanism are more nebulous, but appear to be individual liberty and the right to own property, both of which we approve.

In discussing individual liberty, Dean Manion gives his reader the benefit of some historical background. We were much interested to learn (page 24) that class hatreds and consciousness derived from the French Revolution. We had previously labored under the impression that class hatreds brought on the French Revolution, and that the lines, "When Adam delve and Eve span, who was then the gentleman?" originated in the sixteenth century during a disturbance involving some peasants; and we vaguely recall from our school days reading about some misunderstandings between patricians and plebeians at Rome, and between Athenians and barbarians in Greece.

Dean Manion points out (pages 86-87) how new-found "absolutism" was established in England by the Glorious Revolution. This puzzled us a little, because as we remembered our English history the "rights of free-born Englishmen" tended to become more secure as well as more extensive after 1688—the rights of kings fewer and the rights of the people through Parliament, especially the House of Commons, greater. Our forefathers, we had thought, fought the Revolution because they were denied the "rights of free-born Englishmen". We are happy to stand corrected.

Dean Manion characterizes the supremacy of Parliament as "unchecked absolutism" and a "newly operating tyranny". He regards the free British elections as of no importance in checking the exercise of power. This worries us because in our own Federal Constitution, which we want to maintain if we can, we find that powers not specifically granted to the Federal Government are reserved to "the people of the United States" who did "ordain and establish this Constitution", and that the Constitution is subject to amendment in any direction the people see fit. It is, therefore, possible for the people to abolish their liberties and to establish their own tyranny over themselves. In fact, under the judicial interpretations recently given to the "general welfare clause" (Const. Art. I, Sec. 8; *Helvering* v. *Davis,* 301 U.S. 619, sustaining federal old age benefits and social security; *United States* v. *Gerlach Livestock Company,* 339 U.S. 725, 738), as respects federal powers and expenditures, the majority of the American people can, if they so choose, without amending the Constitution, vote themselves a government that can do all of the things presently occurring in England. In other words, socialism can be voted and be put into operation in the United States of America without any constitutional amendment whatsoever, through the exercise of existing powers. Perhaps one cannot trust anyone these days. Nevertheless, we find ourselves willing to stand or fall with the ballot box.

It has been said that God created man in His own image and man returned the compliment. Dean Manion's "incentive impulse" (page 68), a euphemism for "profit motive", represented to be analogous to the sex impulse and planted in man by a Divine Providence, utterly confounds the works of Caesar with those of God. The argument resorted to on pages 64-65 to demonstrate that unlimited human reproduction is unhampered by finite resources and adequately served by the "incentive impulse" is denied by the great and recurring famines of human history —a subject of increasing concern to many scholars. (See *Human Fertility, a Modern Dilemma* (1951), by Robert C. Cook, with introduction by Julian Huxley). In fact, one need not look far back into the pages of history to find that excessive populations have produced armed conflicts.

Capitalism is a device of Caesar. It has served and is serving the United States well and we should maintain it to the extent we can even under the constant modification pressures to which it is subjected here at home. But this system since its earliest manifestations in Asia Minor and Europe has caused trade rivalries, exploitations and capture of raw materials and markets, which have at times provoked armed conflict. It is being more and more subjected to sharp regulation on the domestic front. It can hardly be deemed the divine, eternal panacea for bringing peace to all men. History teaches us that all human institutions, like all men, are mortal.

It may well give us pause when the dean of a law school of a well-known university attacks "intellectuals" *per se.* Yet, on pages 21-22 that is precisely what Dean Manion

does. We may not agree with the opinions of some of the "powerful and influential 'intellectuals'" to whom he refers, but a broad attack on intellectuals is an attack on reason and on the freedom of the individual to draw whatever conclusions his reason dictates from the facts before him. Let us be devoutly grateful that these conclusions are diverse, for only in diversity does freedom show herself. Maybe the persons referred to are subject to legitimate attack on other grounds, but not within the category of "intellectuals".

The distinguishing features of the American scene have been mainly three: (1) The recognition that all political power inheres in the people; (2) complete secularism in government; and (3) a common language, taught in the common schools, which usually in one generation, possibly two, has destroyed old world ties and developed understanding of, and allegiance to, American ideals and traditions. To these three things we owe such unity as has marked American endeavors to date. The trend is in the direction of more and more popular responsibility for government. By a careful rendering unto Caesar the things that are Caesar's and unto God the things that are God's, the American people, aided by a common language and continuous intermingling at school, business and social levels, have been able to forge Protestants, Catholics, Jews, atheists and agnostics into a homogeneous nation, creative and vital in its heterogeneity.

The secular principle enshrined in the American constitutional system was explained by the Supreme Court of the United States in its recent decision in *McCollum* v. *Board of Education*, 333 U. S. 203 (1947), where the Court said, at pages 210, 211, 212:

> . . . Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State".
>
> ". . . The First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."

There is here no suggestion of an "official conjunction" of the laws of God with the supreme law of the land.

Since Dean Manion frequently quotes Jefferson, we think the key to peace (if peace be ever possible) is less likely to be found, in attempting to transport, by pressure or otherwise, the American way of life, proud as we are of it, around the universe than by according to all peoples that freedom of choice which we claim for ourselves. In the words of Jefferson to Thomas Pinckney, on December 30, 1792:

> We certainly cannot deny to other nations that principle whereon our government is founded, that every nation has a right to govern itself internally under what forms it pleases and to change these forms at its own will; and externally to transact business with other nations through whatever organ it chooses, whether that be a King, Convention, Assembly, Committee, President, or whatever it be. The only thing essential is the will of the nation. Taking this as your polar star, you can hardly err.

Contrast this with Dean Manion's attitude (page 92) warning against "the widespread false impression that any government is safe and good so long as the people choose it themselves". Throughout his little book runs distrust of government by the people and distrust of the ballot box. It seems impossible to reconcile his tribute to Americanism on the one hand and his opposition to government by the people as manifested in popular elections, on the other hand. And while he argues for our constitutional limitations (which we all approve) as a distinguishing feature of our government, in the end (page 99) he says that the American government has "managed to escape the powerful constitutional limitations placed upon it by the Founding Fathers", and, without mentioning the *Helvering* v. *Davis* line of Supreme Court decisions, finds the reason for this escape "in the changed attitude of the American people". If so, what is "Americanism"? His personal definition of it, as of yesteryear? Or the people's determination of it, as of now? Moreover, if so, what is the answer? The ballot box? Or new constitutional limitations originating with "the people of the United States"? Which again means the ballot box!

Proud as we are of our country, we should be modest enough to recognize that we have not found the answer to all of the world's ills.

It can hardly be gainsaid that by our efforts in World War I to spread Americanism and "make the world safe for democracy", we assisted in bringing into being some of the most powerful dictatorships the world has ever seen, in place of at least tolerably benevolent constitutional monarchies that were destroyed; and that by our efforts in World War II, in destroying one set of dictatorships, we (the United States of America) deliberately aided and abetted another one which surpasses in power and menace anything in human history and which has the Western World in the position, to use Charles A. Beard's incomparable expression, of waging "perpetual war for perpetual peace".

Americanism, in its nobler aspects, much as we may like it, and admirably suited though it is to our unusually favorable circumstances, is today less accepted elsewhere than for many years, even among so-called friendly nations, of which there are few, if any.

On the record, Americanism is a far cry from being the key to peace.

Some critical observations seem warranted on other matters:-

In the appendix beginning on page 116 Dean Manion sets out what purport to be "Excerpts from Preambles of Forty-Seven State Constitutions and Dates of Adoption". The quotations from the Constitutions of New Hampshire, Tennessee, Vermont and Virginia are not from preambles at all but from the portions of the bills of rights relating to freedom of religion of the respective states. The Constitution of New Hampshire adopted in 1784, for example, contained no preamble. The passage quoted by Dean Manion is a combination of parts of Clauses V and VI of Article I.

On page 47 Dean Manion quotes a portion of the oath required by members of the Pennsylvania Assembly by the first constitution of that state (1776). He then says: "Similar provisions are found in the first constitutions of all the original states." In this statement the Dean fell into error. There is no similar provision in the New York Constitution of 1777, the Virginia Constitution of 1776, the New Hampshire Constitution of 1776, the Georgia Constitution of 1777, the Connecticut Constitution of 1818, or the Rhode Island Constitution of 1842.

On page 44 we are told, "Constitutions and Bills of Rights are but vain and futile barricades against tyranny unless, as our Declaration of Independence says, they are firmly founded in and upon 'the laws of Nature and of Nature's God' ".

The Declaration says no such thing. The words quoted from the Declaration occur in this context:

> When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

On page 77 Dean Manion quotes a sentence from the second paragraph of *Common Sense* by Thomas Paine and accuses Paine of charging "government to the blight of original sin". It is well known that Thomas Paine did not believe in original sin. The only form of government he caustically likened to this doctrine was hereditary monarchy. (*Common Sense,*[1] *Complete Writing of Thomas Paine,* (Ed. Foner, New York, 1945) page 14. See also, *Age of Reason,* pages 470, 471, 492, 493, 528).

Moreover, Dean Manion appears to misquote Paine's conclusion. The Dean quotes:

> were the impulses of conscience clear and irresistibly obeyed, man would need no other law-giver.

What Paine said was:

> ... were the impulses of conscience clear, *uniform,* and irresistibly obeyed, man would need no other law-giver; ... [italics supplied].

Thus Paine recognized that the impulses of conscience are by no means uniform and are, therefore, an insufficient control of social behavior.

Dean Manion's quotations from Thomas Jefferson raise similar questions. Dean Manion gratuitously likens Jefferson to John Adams, James Madison and Alexander Hamilton as referring "to 'democracy' only to distinguish it sharply from the republican form of our American Constitutional System". (Page 50.) In an effort to pull Jefferson into the Hamiltonian camp, Dean Manion misapplies Jefferson's words, which he quotes on page 61 without indicating the several-page break in the original text between the first and second sentences of the "quotation". The "quotation" is constructed from two widely separated paragraphs of Jefferson's letter to P. S. du Pont de Nemours, of April 24, 1816. In this very letter Jefferson wrote:

> We of the United States, you know, are constitutionally and conscientiously democrats. [11 *The Works of Thomas Jefferson in Twelve Volumes* (Federal Edition, ed. Paul Leicester Ford, Putnam, New York, 1905)].

The very next month he wrote to John Taylor, of Caroline, May 28, 1816:

> Indeed, it must be acknowledged, that the term *republic* is of very vague application in every language. Witness the self-styled republics of Holland, Switzerland, Genoa, Venice, Poland. Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority; and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens. [*The Life and Selected Writings of Thomas Jefferson,* (Modern Library Ed.) pages 669-670].

We point this out solely to show that one cannot safely quote Jefferson in support of the Hamiltonian concept of a republic. Jefferson, it will be remembered, did not sit in the Constitutional Convention. After all, the ideas of "democracy" and "republic" antedate the Christian era and go back at least to Greece and Rome, where the words originated and where they received practical application in various forms.

While all men are free to choose between the political philosophies of Jefferson and Paine, on the one hand, and Hamilton and Madison, on the other, and to reject Paine entirely as a "dirty, little atheist", it seems hardly appropriate to construct quotations from Jefferson and Paine for propositions that would cause these men to protest.

The Dean says (page 82): "There is more Communism and there are more Communists in America today than we had in the deepest trough of the depression in the Nineteen Thirties."

This is a bold and unprovable assertion, especially for a lawyer, and made in the face of many known defections from the party, which are probably but a fraction of the unknown total of defections, the latter being reflected, however, in the rapidly diminishing circulation of Communist newspapers and the much reduced F.B.I. count.

Dean Manion has not favored his readers with complete citations of authority. For our texts of state constitutions we have used *The Federal and State Constitutions,* edited by Francis Newton Thorpe, published by the Government Printing Office, Washington, in 1909, which is the

latest government edition.

ALFRED J. SCHWEPPE
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THE INHERITANCE OF THE COMMON LAW. *By Richard O'Sullivan, K.C. London: Stevens & Son, Ltd. 1950. 8s. Pages 118.*

Here is a book that should be read by every American lawyer who has any feeling at all for the common law. It is a short work dealing not with the technicalities of the law but with its sources and fundamental principles. Our active practitioner today tends more and more to become a mere technician, a specialist in some particular branch of practice, having little contact with the great heritage of the past. Our legislators, mostly lawyers, also have ceased to look to the great fundamental principles of our existing common law and seem to think that all our social ills and injustices will be cured if they can but find the right words to enact into a new statute. As emergency succeeds emergency and crisis follows crisis the volumes of statutory rules and regulations crowd the old treatises from our library shelves (Gresham's Law operates here as well). We necessarily become so immersed in detail that we have little time to consider the foundations upon which the edifice of the law is built. Yet these same statutory rules and regulations can never be more than a mere superstructure; and whether they operate for good or for ill depends in a large measure on how firmly they rest upon these same foundations.

It was to acquaint not only lawyers, but the "common people" as well with "the privileges which in law and custom they enjoy in comparison with other European peoples" that Miss Emily W. Hamlyn, daughter of a solicitor, left her whole estate upon trust. The Hamlyn Lectures this year were delivered at Leeds University by Richard O'Sullivan, K. C., Recorder of Derby, Bencher of the Middle Temple and a member of the General Council of the Bar.

The first of the four lectures that form this book deals with the concept of man under the common law, the free and lawful man, whose right and title to freedom arises out of his rational nature. This free man seeks to live in a "society which is conceived as an association of families of free and lawful men and women living in the fellowship of a free community". Mr. O'Sullivan sees emerging in the place of this free and lawful man a statutory creature, "the insured person", a unit of the omnipotent state. "The new creature of the statutes and statutory rules and orders is, it would seem, in some sense mentally and morally incomplete, not to say defective; and needs for the perfection of his mind and will the light of the anonymous gentleman in Whitehall which lighteth every man that cometh into the realm."

The second lecture treats of the family as the true unit of society; of marriage as it was regarded by the common law; and of the growing tendency toward easy divorce. With respect to the latter Mr. O'Sullivan quotes the late Lord Russell of Killowen as having said in a dissenting opinion, "what was once a holy estate enduring for the joint lives of the spouses is steadily assuming the characteristics of a contract for a tenancy at will".

The third chapter on the political community is a short, learned and witty history of the development of English political theory from the medieval King who was "under God and the law" to the omnipotent Parliament which is under neither.

The concluding chapter is an essay on law and conscience. We see throughout the formative period of the common law the guiding hand of the men of the Holy Church and the influence of Christian philosophy. Despite the decline in our standards Mr. O'Sullivan has profound confidence in the future of the English-speaking peoples, saying: "Yet we who are called upon in war and peace to defend the Christian civilization of the West, may hope for a renaissance of faith and freedom; and a restoration of the old integrities of the Common Law; the integrity of the Individual man; of the Family; and of the Political Community."

Here in a few pages, in strong but simple and nontechnical language and with more than a little wit and charm, our busy practitioner may find set forth those fundamental principles of the common law upon which depend all the freedoms that we hold so dear.

JAMES A. MARKLE
Detroit, Michigan

PATENT TACTICS AND LAW (Third Edition). *By Roger Sherman Hoar. New York: The Ronald Press Company. 1950. $7.00. Pages 352.*

This work is stated to be written for the purpose of enabling "a business executive, an engineer, or an independent inventor to understand and to cooperate with his attorney when dealing with a specific patent problem". The present (third) edition of 1950 takes into account the issuance (March 1, 1949) of the revised Rules of Practice of the Patent Office. The issuance by the Patent Office of the new *Manual of Patent Examining Procedure* also made it desirable to revise the earlier text in order to bring up to date all citations relating to commissioner's orders, notices and the like. Also the present edition is supposed to take into account substantial changes in substantive patent law which have developed in the ten years since the publication of the second edition of this work. The book is directed largely to the narrow field of tactics. Thereby it brings under scrutiny those phases of human nature which are least attractive.

If Clausewitz, in his famous dissertation on war, had centered his attention upon the "tactics" of warfare, omitting broad considerations of policies of state which bring about warfare, the principles of conducting warfare, and the over-all strategy of warfare, and had confined the discussion to tactics, he would probably

have dwelt upon such things as how to mislead and harass the enemy, how to terrorize the innocent civilians, how to wring confessions out of prisoners, when to shoot hostages and how to maim and mangle the troops of the enemy with minimum effort and like gory details. So much of the present volume as is directed to "patent tactics" deals mainly with controversy between the applicant and the Patent Office in about equally distasteful terms. So much of the volume as is directed to patent law is generally informative and objective. The numerous citations of cases outlining practice under the Patent Office procedure are of value.

The book as a whole contains material to be employed in connection with the prosecution of applications before the Patent Office which might be classified as (1) useful information; (2) worldly wisdom; (3) obnoxious instructions. Also running throughout the volume is considerable misinformation or information of doubtful accuracy, particularly on such things as depend upon an understanding of the basic theory on which the patent system is founded and operates.

The volume is not directed to members of the Bar. In fact, this volume is one of the best arguments that could be adduced for requiring all registered practitioners before the Patent Office to be members of the Bar, so as to be subject to a code of ethics. The advice which this volume gives to practitioners before the Patent Office is, in numerous respects, at variance, if not with the letter, certainly with the spirit of the various codes of ethics which members of the Bar throughout the country observe.

Many of the "tactics" advised by this author conflict with sound administrative practice and if subject to judicial review would be roundly condemned.

The author fails to reveal any knowledge of the fundamental theory of the patent system and its administration and fails to make a single suggestion for betterment. Obviously, giving advice as to the employment of "tactics" that are intended to avoid or circumvent requirements of the Patent Office or obligations of the applicant would not lead one to contemplate betterments in the practice.

While a great deal of valuable information is imparted in simple, understandable language, the simplification has resulted in many instances of inaccuracy in statement.

For example, on page 3, it is stated:

> A patent is merely one form of personal property created by its owner.

That is incorrect. The property phase, namely, the grant of the exclusive right, is created by act of the State.

On page 4, the stated object of the patent system is to increase "the store of public knowledge". The Constitution says it is to promote the progress of science and the useful arts.

On page 5, it is stated that the word "patent" itself "alludes to the complete description of the invention which the specification of the patent contains". That is incorrect. Letters patent were issued in England long before a specification was required.

Page 6 recites the patent as consisting of four parts, one of which is "drawings illustrating at least one embodiment of the invention". That is incorrect. Many patents are issued without drawings.

Page 7 states that "most owners of patents cannot manufacture their own devices without thereby infringing someone else's earlier patent". This does not coincide with the experience of the reviewer's office.

Page 9 states:

> The expiration of a patent throws open to the public not only the right to make the patented device (except in so far as it may infringe some extant dominating or subsidiary patent), but also the right to use the trade mark under which the patented device was marketed.

That is misleading. The statement holds only in special cases, such as the *Singer Sewing Machine* case.

Page 12, in speaking of the new Rules of Practice before the Patent Office, the author states:

> There was no rhyme nor reason to the content of former Rules.

So throughout the book there is so much inexcusable inaccuracy or misinformation that the book must be regarded as an unsafe guide.

Chapter II, on "The Business Aspects of Patents", has been revised, so it is stated, "in view of the Meyers decision". There is some valuable information in this chapter for the business executive or accountant.

The advice on page 25 to treat royalty arrangements as sales would certainly not fool the personnel of the Income Tax Bureau with which this reviewer has to deal.

The advice, on pages 33 and 34—"... to provide for a certain offset to royalties in return for trade"—would not stand the scrutiny of the Justice Department looking for antitrust violations and would do the patent owner no good.

Chapter III on "What Is Patentable?" contains useful and objective advice, since it is largely free of any thought of "tactics".

Chapter IV, on "Anticipation and Domination", explains in simple language the effect which an earlier patent has in regard to its teaching and in regard to what it claims upon a later patent.

In Chapter V, on "Who Is Entitled to a Patent?" the following appears on page 56:

> If the applicant dies during prosecution, the safest and simplest course is to keep very quiet and not let the Office find out about his death, especially if the application has been assigned; the resulting patent will be perfectly valid.

We might suggest that if the above facts were revealed in court the patent might be perfectly good, but the attorney might not look so good.

In discussing joint inventors, it is stated:

> However, in the case of infringement of inventions made by employees of a corporation, there is a trend toward refusing to look behind the corporation's own choice of who is the inventor.

We doubt whether the courts would hesitate to look behind the corporation's choice of who is the inventor if that choice were demonstrably

wrong. See in that connection the *Chromium Plating* case.

On page 61, under "Employer and Employee" it is stated:

> In an interference between an employer and an employee, both claiming the same invention, the burden of proof is on the employee.

That is a novel doctrine.

It is next stated:

> . . . And it has even been held that the employer is entitled to have the patent issued in his name as sole inventor when it is clear that he invented jointly with an employee, or even when it is clear that the employee was the sole inventor.

This is unsound advice, as it is contrary to the statutes and the decisions.

Chapter VI, on "Preliminary Protection", includes useful information in simple form, but much of it is oversimplified, and is unreliable. Some of it is in bad taste; some of it is contrary to ethics and good conscience; and some of it is positively wrong. As an example, it is stated on page 72:

> But if you are sure that you do not want a patent on the device in question, you can effectively play the dog in the manger by publishing a full account of the invention in some technical magazine.

As an example of bad advice, see page 73, where it is stated:

> The Trade-Mark Bluff.—As a last resort, if the device is clearly non-patentable, one can nevertheless obtain a degree of patent protection by marking the device with a simple trade-mark, and registering this trade-mark. This registration will enable one to add the magic words "Registered in U.S. Patent Office," which most persons will interpret as meaning that the device is patented. As the chief value of a patent is merely as a scarecrow, one will thus have obtained the chief value of a patent.

Men of character do not indulge in such practices.

Rudyard Kipling has a comment which is appropriate,

> Now there aint no law on the Cocos Keys
> To hold a white man in,
> But I would not steal a nigger's meal
> For that is a nigger's sin.

Chapter VII on "Drafting of the Application" contains several jolts, one of which, on page 82, advises how to avoid having the application assigned to an assistant examiner who is believed to be hostile to a certain type of application.

Another is on page 86:

> If the invention consists in improving one element of an old combination without affecting the operation of the other elements, the claim should not include the unimproved elements. But the inclusion of the unimproved element *if it gets by the Patent Office* may turn out to be very valuable in enhancing the damages recoverable from an infringer. [Italics added.]

We advise reading the case of *Lincoln Engineering Company* v. *Stewart Warner.*

On page 87, it is stated:

> An obvious method of making an old product is *not* patentable. But an obvious method of making a *new* useful and inventive product *is* patentable.

In our experience, an obvious method is never patentable.

On page 89, to gain certain advantages abroad, the author advises including a certain catch-all phrase when the application is filed, of which he says:

> The last six words are illegal and might render the whole patent void; so they should be deleted by the first amendment.

The practice advised is obviously unsound.

On page 90 *et seq.*, the author discusses eleven ways of avoiding a patent cited by the examiner. Some of these ways resemble the private printing of paper money or distilling moonshine—lucrative, but hazardous.

The author goes to great pains to explain that an applicant should never put his application in such good form that it would be allowed on the first official examination. That advice is a perversion of the practice.

On page 98 the author says:

> Any changes made in any of the papers after the executing of the oath, will render the application liable to be stricken from the files; this cannot be emphasized too strongly. The absurdity of this rule is illustrated by the ease with which one can get around it, by embodying the changes in an amendment.

We doubt whether this advice will appeal to any member of the Bar.

In Chapter VIII, entitled "Fighting It Out", the author gives homely advice which, except for a few deviations into bad taste, is useful.

We doubt whether any sound administrative procedure could be evolved if the general practice were to file petitions for action by the Government which the applicant did not wish to have allowed as filed. But note on page 119 a repetition of the theme, when the author says:

> A complete allowance on the first action is very *unfortunate.*

In Chapter IX, "Miscellaneous Considerations of Prosecution", the author advises taking the inventor along to an interview with the examiner, but the inventor is to be cautioned "that he must give no information to the Examiner unless requested by the attorney". The author says:

> It is not the object of this cautioning to deceive the Examiner by withholding material facts, but rather to avoid injecting irrelevant matters and avoid unfounded admissions.
>
> But if an inadvertent admission is made, the attorney should fall back on the principle that oral statements by the applicant (or, for that matter, by the Examiner) are not binding.

On pages 138 and 139 it is pointed out that—

> In handling a patent case, an almost unlimited amount of delay is possible.

The reader is advised:

> Thus, in the absence of any other considerations, an attorney will always delay as much as possible; and this is perfectly ethical.

To bring it about, he advises, among other things:

> You can keep making intentional mistakes or inserting unallowable claims in every amendment.

The author is aware that this is improper, for he says (page 139):

> Although long pendency does not weaken the standing of a patent in the courts, nevertheless a record of habitual delay in answering each action will prove almost fatal to a petition to revive, and in general will hurt one's standing with the Office.

On page 140, the author advises that if the attorney finds a reference which the Examiner has not discovered, he should do as follows:

> But, if the patent be desired merely as a scarecrow, then it would be well to keep quiet about the prior patent, and secure as broad claims as possible,

even though some of them may be invalid by reason of the prior patent. To call a reference to the Examiner's attention in writing insults him by placing in the record, for his superiors to see, the fact that he has been slipshod in his search.

Chapter X, on Interferences, contains valuable general information, but it is marred by advice such as that which counsels collusion between junior applicants in an interference, on page 176, and collusion in the settlement of an interference by agreement, on page 180. Additionally, there are inaccuracies, such as the advice, on pages 176 and 177, on "What It Takes To Win".

Chapters XI to XXI cover, in a sketchy manner, a variety of ancillary matters which an executive or engineer will be grateful to have called to his attention. The moral tone of these chapters is slightly better than the previous ones.

The book has value, particularly for the citations which it contains on the various points of Patent Office practice.

If the advice given in this book represents the standard of morality of practitioners before the Patent Office, it is understandable that the name "patent attorney" or "patent agent" might be malodorous.

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Notice to Members of Junior Bar Conference of Elections of Officers and Members of Council

■ Notice is hereby given that at the Annual Meeting of the Junior Bar Conference, to be held in New York, September 17, 18, and 19, 1951, there will be elected a Chairman, Vice Chairman and Secretary, each for a term of one year, a Member of the Executive Council from each of the First, Third, Fifth, Seventh, and Ninth Federal Judicial Circuits and the District of Columbia, and a Member-at-Large from the Fifth and Eighth Circuits, each for a term of two years. Additionally, there will be a special election for Member-at-Large of the Executive Council from the Ninth and Tenth Circuits for the term of one year.

Pursuant to Section 4(B) of Article IV of the By-Laws, and the provisions of the Manual with respect to the new election procedure, notice is hereby given that members of the Junior Bar Conference may nominate candidates for the office of Chairman, Vice Chairman and Secretary, and for the office of Member of the Council from their respective Districts, by written petition, in each case, specifying the name of the person nominated and the office for which nominated, containing the names of at least twenty endorsers, which in the case of a Member of the Council must all be residents of the District of the person nominated. The petition shall state briefly a biographical sketch of the background and qualifications of the candidate. A petition to be considered shall be submitted to the Chairman, Charles H. Burton, Munsey Building, Washington, D. C., not later than June 15, 1951. The Chairman shall cause to be published in the July issue of *The Young Lawyer*, the name and address, and, if possible, the brief biographical sketch of each person for whom a petition for the office of Chairman, Vice Chairman or Secretary, has been submitted, designating, in each instance, the office for which each petition has thus been submitted.

At the first session of the Annual Meeting, the Chairman shall appoint a Nominating Committee in the manner specified in the Manual regarding the new election procedure. The attention of the Members of the Council and State Chairmen is specifically called to this portion of the Manual, in order that its provisions might be carried out in as democratic a manner as possible. At such first session the Chairman of the Conference shall deliver to the Chairman of the Nominating Committee all petitions submitted pursuant to this notice.

The Nominating Committee shall not nominate for the position of Chairman, Vice Chairman or secretary, any person for whom a petition has not been submitted as herein provided, except that this provision shall not apply where no petition has been submitted on behalf of anyone in connection with the office in question. If a petition has been submitted on behalf of anyone for the position of Chairman, Vice Chairman or Secretary, such person may be nominated by the Nominating Committee for any of such offices, or as a Member of the Council for the particular Circuit or District of that candidate.

The Nominating Committee shall consider the candidates proposed by each of said petitions, and, in the case of nominees as Members of the Council, shall receive the names of other candidates, and shall report its Council nominees at the same time and place and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following the report of the Nominating Committee, as may other nominations also be made for the offices of Chairman, Vice Chairman or Secretary.

The election of the Members of the Council shall take place at the same time and place, and in the same manner, as the election of officers, immediately following the conclusion of the second general session of the Annual Meeting, and shall be by written ballot.

The terms of office of the officers and the Members-of-the-Council-at-Large from the Ninth and Tenth Circuits shall begin on January 1, 1952, and shall continue until December 31, 1952, or until their successors shall have been elected and qualified, and the terms of office of Council Members from the First, Third, Fifth, Seventh and Ninth Federal Judicial Circuits and the District of Columbia, and of the Members-at-Large from the Fifth and Eighth Circuits, shall begin on January 1, 1952, and shall continue until December 31, 1953, or until their successors shall have been elected and qualified.

No person shall be elected as an officer or Member of the Council if he will, during his term of office, become ineligible for membership in the Conference. The membership of a Member of the Conference shall terminate at the end of the calendar year within which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. A person elected as a Member of the Council shall be, at the time of his nomination, a resident of the Council District for which he is chosen. No person shall be eligible for election as a Member of the Executive Council if he is then a member of the Council, and has been such a member for a period of three consecutive years or more.

RICHARD H. BOWERMAN
Secretary, Junior Bar Conference

Review of Recent Supreme Court Decisions

COMMERCE

State Franchise Tax on Common Carriers Measured by Gross Receipts Apportioned To Length of Lines Within State Upheld Against Claim of Violation of Import-Export Clause of Constitution

■ *Canton Railroad Company* v. *Rogan,* 340 U. S. 511, 95 L. ed. Adv. Ops. 334, 71 S. Ct. 447, 19 U. S. Law Week 4130 (No. 96, decided February 26, 1951.)

■ *Western Maryland Railway Company* v. *Rogan,* 340 U. S. 520, 95 L. ed. Adv. Ops. 339, 71 S. Ct. 450, 19 U. S. Law Week 4132. (No. 205, decided February 26, 1951.)

In these cases the appellant common carriers challenged the constitutionality of a franchise tax imposed by the State of Maryland measured by gross receipts of the companies apportioned to the length of their lines within the state.

The Canton Railroad Company was a common carrier of freight operating entirely within the City of Baltimore. Its activities included switching freight cars from piers in the Port of Baltimore to the lines of connecting railroads, storage, wharfage and weighing of loaded freight cars. Much of the freight handled consisted of exports and imports from and into the United States. Canton claimed that $705,957.21 of a total gross receipts for 1946 of $1,588,744.48 was exempt from the franchise tax because it was derived from operations in foreign commerce, citing the import-export clause of the Constitution. The Maryland Tax Commission rejected this contention after a hearing, and its order was affirmed by the Baltimore Circuit Court and the Court of Appeals of Maryland.

On appeal to the United States Supreme Court, Mr. Justice DOUGLAS wrote the opinion of the Court affirming. The tax in question was not a tax on *goods* but on the *handling* of goods at the port, he said. While an article may be an export and immune from tax long before and after it reaches the port, he said, "when the tax is on activities connected with the export or import the range of immunity cannot be so wide". The opinion concluded that any activity more remote than loading for export or unloading for import was not a part of the import or export process.

With respect to the objection to the tax on the ground that interstate commerce was involved, he said: "It is settled that a nondiscriminatory gross receipts tax on an interstate enterprise may be sustained if fairly apportioned to the business done within the taxing state . . . and not reaching any activities carried on beyond the borders of the state."

In No. 205, the facts were similar. Mr. Justice DOUGLAS said that the opinion in No. 96 disposes of this case as well, adding that it illustrates "how wide a zone of tax immunity would be created" by a contrary decision, since No. 96 dealt only with the handling of exports and imports within a port, while here there is transportation of exports and imports to and from the port.

The CHIEF JUSTICE took no part in the consideration or decision of these cases.

Mr. Justice JACKSON wrote an opinion entitled in both cases in which Mr. Justice FRANKFURTER concurred. He said that he reserved judgment "in the belief that today's decision of the Court may be found, upon consideration of matters not briefed or argued, to be untenable". The concern written into the Constitution about exports and imports is a "manifestation of a realistic recognition that a state or city with a safe harbor sits at a gateway with not only an inevitable natural advantage, but also a strategic one which may be exploited if not restrained", he said. The policy of the Constitution is to avoid such exploitation and to maintain free and equal access to foreign ports for inland areas. He observes that "If the constitutional policy can be avoided by shifting the tax from the exported article itself to some incident such as carriage, unavoidable in the process of exportation, then the policy is a practical nullity. If these goods do constitute exports, Maryland's tax is on the gross proceeds of their transportation and handling, not merely the profits therefrom, he says. This adds to the cost of their reaching ship-side and clearly constitutes an obstruction of the federal policy. He said he did not wish to express a final view on the matter since the effect of the federal policy on the validity of the tax was not advanced in the courts below nor before him.

The cases were argued by John Henry Lewin for the appellant in No. 96, by William C. Purnell for the appellant in No. 205, and by Harrison L. Winter and Hall Hammond for appellees.

COMMERCE

Interstate Commerce Act Empowers Interstate Commerce Commission To Reserve Right To Modify Certificate of Convenience and Necessity and Such Reservation Permits Prohibition of Service of Motor Transport Companies Owned by Railroads Between Points Which Are Stations on Railroad

■ *United States* v. *Rock Island Motor Transport Company,* 340 U.S. 419, 95 L. ed. Adv. Ops. 351, 71 S. Ct. 382, 19 U. S. Law Week 4139. (No. 25, decided February 26, 1951.)

■ *United States* v. *Texas and Pacific Motor Transport Company, Regular Common Carrier Conference of American Trucking Associations, Inc.* v. *Texas and Pacific Motor Transport Company,* 340 U. S. 450, 95 L. ed. Adv. Ops. 367, 71 S. Ct. 422, 19 U. S. Law Week 4148. (Nos. 38 and 39, decided February 26, 1951.)

These cases involved the power of the Interstate Commerce Commission to tighten restrictions on operations of motor-carrier affiliates of railroads. In No. 25, Rock Island

Reviews in this issue by Rowland L. Young

Motor Transport Company, a subsidiary of the Chicago, Rock Island and Pacific Railway Company, held a certificate of convenience and necessity for the operation of motor carrier service between certain points in Illinois, Iowa and Nebraska. It had purchased its rights from the so-called White Line. The certificate authorized service to and from intermediate points on the routes, which were also stations on the railroad, but contained a clause stating that operations to and from the intermediate points on the above-specified routes were "subject to such further limitations, restrictions or modifications as we [the Interstate Commerce Commission] may find it necessary to impose or make in order to insure that the service shall be auxiliary or supplemental to the train service of The Chicago, Rock Island and Pacific Railway Company and shall not unduly restrain competition". Transit had acquired from the holders of a certificate of convenience and necessity a second route between Atlantic, Iowa, and Omaha, Nebraska. The Commission had issued no order for a certificate to Transit for this route. In each case, the Commission prohibited motor-carrier service between certain key points which were also stations on the railroad.

The railroad and Transit in No. 25 sought relief from these tightened restrictions from a three-judge district court. Relief was granted, the orders were cancelled and their enforcement enjoined. Transit's objection was that the Commission's order changed or revoked part of Transit's operating authority previously granted without any failure on the company's part to comply with any terms of the authority under which it functioned. It contended that such change violated Section 212(a) of the Interstate Commerce Act. The Commission took the position that there was no change or revocation of Transit's authority to operate as a motor carrier.

The opinion of the Supreme Court reversing was read by Mr. Justice REED. The Interstate Commerce Act has given the Commission discretionary power to limit the authority granted by a certificate of convenience and necessity, he said. If the Commission deems it useful in promoting competition, he said, it may require the railroad-affiliated motor carrier to perform only those services that are auxiliary and supplemental to the rail service. It is consonant with this power in the Commission, he continues, for it to reserve the right, when granting a certificate, to make further limitations, restrictions or modifications to insure that service remains auxiliary or supplemental. "Congress could not have expected the Commission to be able to determine once and for all the provisions essential to maintain the required balance" he said. "Such a reservation, of course, does not provide unfettered power in the Commission to change the certificate at will." In this case, the conditions added by the Commission are not changes in or revocations of a certificate, he declared, but a carrying out of the reservation in the certificate.

As for the imposition of the conditions on Transit's second route Mr. Justice REED says that the Commission's order approving purchase of that route by Transit "has not the finality of a certificate but is rather only a tentative approach to the consummation of the purchase subject to changes in conditions and requirements". The certificate is the final act that validates the operation, he declared. "Until its form and content are fixed by delivery to the applicant, the power to frame it in accordance with statutory directions persists." "A railroad purchaser does not necessarily receive all rights a certificate holder possesses", he said, so that Transit cannot rely on its "grandfather clauses", to establish any rights. Transit took its certificate and obtained approval of its acquisition to operate in aid of the railroad, he said, and it cannot argue that it has been deprived of property without due process by the modification. It had nothing of which it was deprived by the contested order.

Nos. 38 and 39 raised substantially the same issue as No. 25. Mr. Justice REED's opinion states the facts, which involved certificates of convenience and necessity that the Commission modified as provided for in reservations contained in the certificates and were identical in substance with those in No. 25 except that these were certificates for new routes. The District Court enjoined enforcement of the Commission's order on the theory that appellants' operations were at all times auxiliary and supplemental and could not be restricted as attempted. Mr. Justice REED declared that that issue was resolved in favor of the Government by the opinion in No. 25 in spite of the fact that the instant cases involved new, rather than purchased, routes.

The appellants in these cases raised a further question, arguing that, as evidence was taken in the original application that resulted in the necessary finding for issuance of the certificates, changes in practices could not now be made by the Commission without evidence that practices formerly permitted had been inconsistent with public interest and did unduly restrict competition. Mr. Justice REED said that a commission examiner had examined an official of the appellant as to the nature and extent of its operations. This evidence developed the fact that Transport operated both on motor carrier and rail rates in full competition with other motor carriers, he said. "Thus there appears in the record adequate evidence of the circumstances of Transport's operations", he declared.

Mr. Justice BLACK, Mr. Justice DOUGLAS, Mr. Justice JACKSON and Mr. Justice BURTON dissented in all three cases.

The cases were argued by Daniel W. Knowlton for the United States in Nos. 25, 38 and 39; Harry E. Boe, Einar Viren, Ernest Porter and Burt F. Wisdom for the appellees in No. 25; Frank C. Brooks for the appellee in No. 39; and J. T. Suggs for the appellee in No. 38.

CONSTITUTIONAL LAW

Corporation Doing Business Through Branch Office in Foreign State Can Avoid Local Taxes Only by Showing That Particular Transactions Are Dissociated From the Local Business and Are Interstate in Nature—Orders Sent by Foreign State Customer to Home Office and Shipped to Customer Meet This Test

■ *Norton Company* v. *Department of Revenue of the State of Illinois,* 340 U. S. 534, 95 L. ed. Adv. Ops. 329, 71 S. Ct. 377, 19 U. S. Law Week 4128. (No. 133, decided February 26, 1951.)

The Norton Company, a Massachusetts corporation, manufactures and sells abrasive machines and supplies. It operates a branch office and warehouse in Chicago from which it makes local sales at retail. This case involves Illinois' collection of an occupation tax "upon persons engaged in the business of selling tangible personal property at retail in this State". The basis for computation of the tax is gross receipts. The state Department of Revenue collected, under protest, the tax on Norton's entire gross income from sales to Illinois residents. The question was whether Illinois had exceeded the constitutional range of its taxing power by taxing all of petitioner's Illinois-derived income. Norton conceded that direct sales of items carried in stock at the Chicago branch were subject to the tax, but it contended that sales resulting from orders received in Chicago for items not stocked there and forwarded to Massachusetts were interstate commerce, not constitutionally subject to the tax. Some of these orders were consigned to the Chicago branch in carload lots and reconsigned there in the original packages to the customers, others were sent directly to the buyer from Massachusetts. The Illinois Supreme Court held that the presence of the local retail outlet, under the circumstances, was sufficient to attribute all income from Illinois sales to that outlet and render it all taxable.

Speaking for the United States Supreme Court, Mr. Justice JACKSON declared that when a corporation has gone into a state to do local business by state permission and has submitted itself to the taxing power of that state, it can avoid local taxes "only by showing that particular transactions are dissociated from the local business and interstate in nature". Here, he said, in the light of all the evidence, the judgment was permissible in attributing to the Chicago branch income from all sales that utilized it either in receiving the order or distributing the goods. The only income not subject to this state tax, he declared, was that from orders sent directly to Massachusetts by the customer and shipped directly to the customer from Massachusetts. The judgment of the Illinois Supreme Court was vacated and the cause remanded for further proceedings not inconsistent with his decision.

Mr. Justice REED wrote an opinion dissenting in part. He did not agree with the majority, he said, insofar as it held that orders forwarded by the Illinois branch to Massachusetts, filled in Massachusetts and shipped direct to the customer in Illinois were subject to the tax. In such sales, title passes in Massachusetts, he declared, and the transaction is interstate. He would reverse the Illinois court insofar as it holds such transactions subject to the Illinois tax.

Mr. Justice CLARK, joined by Mr. Justice BLACK and Mr. Justice DOUGLAS, wrote an opinion dissenting in part. He would affirm the judgment of the Illinois Supreme Court in its entirety, he declared, including its holding that goods shipped directly to Illinois customers from Massachusetts on orders sent directly to Massachusetts by the customers were subject to the tax. He referred to the majority's statement that petitioner had the burden of proving that such sales were immune and said that it had not met that burden. Norton's Chicago office is its "only source of customer relationship in Illinois", he remarked; it is the sole means through which it can be reached with process by Illinois courts, it offers service to machines after sale and replacements of machines that are defective. This gave its Illinois operation a local character, he declared.

The case was argued by Joseph B. Brennan for the Norton Company, and by William C. Wines for the Illinois Department of Revenue.

CONSTITUTIONAL LAW

State Tax on Franchise of Foreign Corporation for Privilege of Doing Business Within State When Business Consists Solely of Interstate Commerce Held To Violate Commerce Clause of United States Constitution

■ *Spector Motor Service, Inc.,* v. *O'Connor,* 340 U. S. 602, 95 L. ed. Adv. Ops. 435, 71 S. Ct. 508, 19 U. S. Law Week 4183. (No. 132, decided March 26, 1951.)

The Spector Motor Service, Inc., was a Missouri corporation engaged exclusively in interstate trucking. In this action it sought to enjoin collection of assessments and penalties levied against it under Connecticut Corporation Business Tax Act of 1935, contending that the tax imposed by the Act did not apply to it and that, if it did, such application violated the commerce and due process clauses of the United States Constitution. The Connecticut Supreme Court of Errors described the tax as "a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they are domestic or foreign". Spector's business was solely interstate commerce. The tax was computed at a nondiscriminatory rate on that part of the corporation's net income that was "reasonably attributable to its business activities within the State".

Speaking for the Supreme Court, Mr. Justice BURTON delivered an opinion holding the tax unconstitutional. It was not levied as compensation for the use of highways or collected in lieu of of an *ad valorem* property tax, he declared, nor was it a fee for inspection or a tax on sales or use. "The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to the business done within the state"

he declared. He noted that his opinion was "not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate". The flaw in the tax under consideration, he said, was that it attached solely to the franchise of the petitioner to do interstate business.

Mr. Justice CLARK wrote a dissenting opinion in which he was joined by Mr. Justice BLACK and Mr. Justice DOUGLAS. He declared that "if appellant had been engaged in an iota of activity which the Court would be willing to call 'intrastate,' Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ. . . ." The tax is struck down simply because Connecticut has verbally characterized it as a levy on the privilege of doing business within its borders, he observed. If the company made intrastate deliveries, he said, its activities in Connecticut would differ only in that its trucks might use different streets and highways and make different stops—the protection and services rendered by the state would be the same.

The case was argued by Cyril Coleman for the Spector Motor Service, and by Louis Weinstein for the respondent.

CONSTITUTIONAL LAW

Full Faith and Credit Must Be Given To Out-of-State Divorce Decree and It Cannot Be Collaterally Attacked by a Person Barred from Making a Collateral Attack in the Granting State

■ *Johnson* v. *Muelberger,* 340 U. S. 581, 95 L. ed. Adv. Ops. 411, 71 S. Ct. 474, 19 U. S. Law Week 4177. (No. 296, decided March 12, 1951.)

Eleanor Muelberger, as legatee, sought in this case to attack in New York the validity of her father's Florida divorce. She was the daughter of his first marriage. After her mother's death, her father remarried and he and his second wife established their residence in New York. The second wife obtained a divorce in a Florida proceeding in which he appeared and contested the merits. It was undisputed that she did not comply with the jurisdictional ninety-day residential requirement. Two years later, the father married for a third time. In 1945, he died, leaving a will in which he gave his entire estate to his daughter. The third wife filed notice of her election to take the widow's statutory one-third share of the estate under New York law. The daughter contested and, after a trial, the New York Surrogate determined that she could not attack the third wife's status as surviving spouse on the basis of the alleged invalidity of the second wife's divorce because the divorce proceeding had been a contested one and "[s]ince the decree is valid and final in the State of Florida, it is not subject to collateral attack in the courts of this state". The Appellate Division affirmed, *per curiam,* but the New York Court of Appeals reversed, basing its holding on its deduction from Florida cases that Florida law would allow a collateral attack on the Florida divorce decree since the daughter was not a party in the divorce proceeding.

The opinion of the Supreme Court was delivered by Mr. Justice REED. He traced briefly the recent holdings of the Court as to the effect of the full faith and credit clause on out-of-state divorces, saying that "a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree. Such an attack is barred where the party attacking would not be permitted to make a collateral attack in the courts of the granting state." Florida law does not permit a collateral attack here, he says, and accordingly "New York cannot permit such an attack by reason of the full faith and credit clause".

Mr. Justice FRANKFURTER dissented, "substantially for the reasons given in the opinion of the New York Court of Appeals, 301 N. Y. 13, in light of the views expressed by him in *Sherrer* v. *Sherrer* and *Coe* v. *Coe,* 334 U. S. 343, 356".

Mr. Justice MINTON took no part in the consideration or decision of this case.

The case was argued by William E. Leahy for Johnson, and by Sam Hammer for Muelberger.

FEDERAL FOOD, DRUG AND COSMETIC ACT

Product Plainly Labeled "Imitation Jam", Resembling Real Jam in Taste and Appearance, Shipped in Interstate Commerce, Held Not To Be "Misbranded"

■ *Sixty-two Cases, More or Less, Each Containing Six Jars of Jam, Assorted Flavors* v. *United States,* 340 U. S. 593, 95 L. ed. Adv. Ops. 443, 71 S. Ct. 515, 19 U. S. Law Week 4187. (No. 363, decided March 26, 1951.)

The United States sought to condemn sixty-two cases of "Delicious Brand Imitation Jam" manufactured in Colorado and shipped to New Mexico. The regulation of the Federal Security Administrator, issued under the Federal, Food, Drug and Cosmetic Act, specifies that a fruit jam must contain "not less than 45 parts by weight" of the fruit ingredient. The product in question is composed of 55 per cent sugar, 25 per cent fruit and 20 per cent pectin. The Government contended that the product was therefore misbranded under Section 403 (g) of the Food, Drug and Cosmetic Act, which condemns as "misbranded" a product that "purports to be or is represented as a food" the ingredients of which the Administrator has standardized, if the product does not conform in all respects to the standards prescribed. Section 403 (c) of the Act directs that a food shall be deemed misbranded if it "is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imita-

tion' and, immediately thereafter, the name of the food imitated".

The district judge found that the product in question did not meet the prescribed standards for fruit jam, that it was "wholesome" and "in every way fit for human consumption", that it had the taste and appearance of standardized jam, that similiar products were sold in response to telephone orders for "jams" and were served in restaurants to people who had no opportunity to learn the quality of what they received. There was no evidence of palming off. The trial judge concluded that the labels were substantially accurate and that, since the product purported to be only an imitation and complied with all requirements of Section 403(c), it could not be deemed to be "misbranded".

The Court of Appeals for the Tenth Circuit, reversing, held that, since the product closely resembled fruit jam and was used as a substitute, it "purported" to be fruit jam and must be deemed "misbranded", notwithstanding the fact that it was duly labeled "imitation".

Mr. Justice FRANKFURTER wrote the opinion of the Supreme Court reversing. He said that, according to the Federal Food, Drug and Cosmetic Act, nothing could legally be "jam" after the Administrator had promulgated his standard unless it contained the specified ingredients in the prescribed proportions. The product here, he said, was not "jam" and could not be so labeled and then be introduced into interstate commerce. However, this product is sold as "imitation jam", he continues, and Congress has left the meaning of that word to the understanding of ordinary English. There is no contention that the label in any way falls short of the requirements of Section 403 (c), he declares. He says that Section 403(g) was designed to protect the public from inferior foods resembling standard products but marketed under distinctive names. "The Government would have us hold that when the Administrator standardizes the ingredients of a food, no imitation of that food can be marketed which contains an ingredient of the original and serves a similar purpose", he stated. There is nothing in the act to show that Congress intended such a result, he concludes.

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, wrote a short dissenting opinion. "The holding of the majority constrains us to say that petitioner's 'jam' purports to be 'jam' when we read Section 403 (g) and purports to be not 'jam' but another food when we read Section 403 (c) ", he says. ". . . if petitioner's product did not purport to be 'jam' petitioner would have no claim to press and the Government no objection to raise" he observed.

The case was argued by Benjamin F. Stapleton, Jr., for petitioners, and by Robert L. Stern for the United States.

LANDLORD AND TENANT

Restitution of Rents Overcharged May Be Awarded Under Housing and Rent Act of 1947 Despite Termination of Rent Control Before Suit

■ *United States* v. *Moore,* 340 U. S. 616, 95 L. ed. Adv. Ops. 431, 71 S. Ct. 524, 19 U. S. Law Week 4181. (No. 344, decided March 26, 1951.)

This was an action under the Housing and Rent Act of 1947 to obtain damages for violation of the Act and restitution of overceiling rentals collected. Respondents were landlords in the City of Dallas, Texas, who had demanded and received rents in excess of those allowed by the applicable maximum rent regulation. The Government filed a complaint in the United States District Court on June 29, 1949, seeking a prohibitory injunction, restitution of all overcharges, and statutory damages. Respondents moved to dismiss on the ground that rent control had been terminated in Dallas on June 23, 1949, six days prior to the filing of the complaint. It was contended that this termination included all the remedial provisions of the Rent Control Act and that no saving clause was applicable. The District Court denied the motion to dismiss and a trial to the court ended in judgment in favor of the Government for damages and restitution. The Court of Appeals for the Fifth Circuit reversed, holding that the Government had a right of action solely for statutory damages, and remanded for new trial on that issue. It dismissed insofar as the complaint sought injunctive relief and restitution, holding that restitution might be ordered as ancillary to injunctive relief against violation, but that with the termination of controls and the consequent end of the right to an injunction "there remained no proceeding of which equity would have jurisdiction to which restitution could be adjunctive".

Mr. Justice CLARK delivered the opinion of the Supreme Court reversing. He cited Section 206 (b) of the Act, which provides that if, in the judgment of the Housing Expediter, there is an actual or threatened violation of the Act or any regulation thereunder, "the United States may make application to any . . . court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond". Mr. Justice CLARK said that, if this provision had been intended merely to insure subsequent obedience to rent regulations, "it would have been unnecessary to authorize orders for other than injunctive relief since the latter remedy is wholly adequate to secure prospective compliance".

In reply to the argument that the termination of controls ended the legal effect of the sections of the Act under which this action was begun, the opinion states that Section 204(f) of that Act provides for the survival of rights and liabilities incurred prior to the expiration of the Act.

Mr. Justice CLARK's opinion dis-

misses respondents' contention that trial of the proceeding as an action for equitable relief denied their right to jury trial, saying that no jury trial was demanded and, so far as the record showed, any such right had been waived.

It was noted that the CHIEF JUSTICE and Mr. Justice DOUGLAS would have affirmed the judgment on the opinion of the Court of Appeals.

Mr. Justice BLACK and Mr. Justice FRANKFURTER would have affirmed the judgment of the Court of Appeals.

The case was argued by James L. Morrisson for the petitioner, and by Frank Cusack for respondents.

MONOPOLIES

Where Judgment of Guilt in Antecedent Criminal Antitrust Conspiracy Case Did Not Necessarily Establish Any Acts of Guilty Defendant Against Plaintiff, Criminal Judgment Was, in Subsequent Civil Case, Prima Facie Evidence Under Clayton Act Section 5 of Conspiracy and Its Effectuation But Not of Impact of Conspiracy on Plaintiff

■ *Emich Motors Corporation* v. *General Motors Corporation*, 340 U. S. 558, 95 L. ed. Adv. Ops. 285, 71 S. Ct. 408, 19 U. S. Law Week 4119 (No. 209, decided February 26, 1951.)

This was a suit brought under Section 4 of the Clayton Act by petitioner, Emich Motors Corporation, against General Motors and its related finance company, General Motors Acceptance Corporation, to recover treble damages for injuries allegedly suffered by reason of a conspiracy in restraint of trade in violation of the Sherman Act. Petitioner alleged that its franchise as a General Motors dealer had been cancelled pursuant to such a conspiracy. Respondents had previously been convicted on an indictment charging them with conspiracy in restraint of trade. In the instant case, Emich Motors was permitted to introduce the criminal indictment, the verdict and judgment as evidence under Section 5 of the Clayton Act: "A final judgment or decree rendered in any criminal prosecution . . . brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . .". The jury returned a verdict in favor of Emich Motors resulting in a judgment for $1,236,000 treble damages.

The Court of Appeals for the Seventh Circuit reversed, criticizing the use of the indictment as an exhibit to the complaint. The Court of Appeals held that it was serious error to send the indictment as an exhibit to the jury and for the trial judge to instruct that the jury "could look to it [the indictment] to ascertain the *means* and the *acts* committed in furtherance of the conspiracy", since it was unnecessary "for the Government to prove . . . any of the acts or means, except for the purpose of establishing venue, in order for the jury in the criminal proceeding to find defendants guilty".

The Supreme Court granted certiorari to determine "whether the Court of Appeals erred in construing Section 5 of the Clayton Act . . . as not permitting: (a) the admission in the instant case of the indictment in the antecedent criminal case against respondents, nor (b) the judgment therein to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellation".

Mr. Justice CLARK delivered the opinion of the Supreme Court. He pointed out that five different views were before it: (1) petitioner's view that the judgment was prima facie evidence that the franchise was cancelled pursuant to the conspiracy and that the entire criminal record was admissible, (2) the trial court's view which differed only in excluding the criminal testimony, (3) the view of the United States as *amicus curiae* that the judgment was prima facie evidence of the conspiracy and such acts in its performance as the criminal jury had necessarily found to have occurred and that the criminal pleadings might be submitted to the jury in the civil case, (4) the view of the Court of Appeals that the criminal judgment was evidence only of the conspiracy and none of the record should be exhibited to the jury and (5) respondents' contention that, since it was unnecessary in the criminal case to find performance of all of the acts charged, it was impossible to determine which of the acts charged were performed and consequently the judgment had no relevance.

The Supreme Court reversed both judgments and remanded the cause to the District Court for further proceedings in accordance with its opinion. It was held that the criminal judgment was not prima facie evidence that the franchise was cancelled pursuant to a conspiracy but was prima facie evidence of the conspiracy and its effectuation by coercing dealers to use G.M.A.C., Mr. Justice CLARK saying: "We are, therefore, of opinion that the criminal judgment was prima facie evidence of the general conspiracy for the purpose of monopolizing the financing of General Motors cars, and also of its effectuation by coercing General Motors dealers to use G.M.A.C. To establish their prima facie case it therefore was necessary for petitioners only to introduce, in addition to the criminal judgment, evidence of the impact of the conspiracy on them, such as the cancellation of their franchises and the purpose of General Motors in cancelling them, and evidence of any resulting damages. From this it follows that the Court of Appeals was in error when it held that the judgment was prima facie evidence only of a conspiracy by respondents."

With respect to the duty of the trial judge the Court said: "He is not precluded from resorting to such portions of the record, including the pleadings and judgment, in the antecedent case as he may find necessary or appropriate to use in presenting to the jury a clear picture of the issues decided there and relevant to

the case on trial. [Citing a case.] A similar discretion must be exercised in approving the attachment of a copy of the indictment as an exhibit to the complaint.

"In summary the trial judge should (1) examine the record of the antecedent case to determine the issues decided by the judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial."

Mr. Justice MINTON took no part in the consideration or decision in this case.

The case was argued by Anthony Bradley Eben for Emich Motors, and by Ferris E. Hurd for General Motors.

UNITED STATES

Federal Tort Claims Act Permits United States To Be Impleaded as Third-Party Defendant To Answer Claim for Contribution as Joint Tortfeasor

■ *United States* v. *Yellow Cab Company, Capital Transit Company* v. *United States,* 340 U. S. 543, 95 L. ed. Adv. Ops. 321, 71 S. Ct. 399, 19 U. S. Law Week 4123. (Nos. 218 and 204, decided February 26, 1951.)

In No. 218, four passengers injured in a collision between a taxicab and a United States mail truck sued the Yellow Cab Company in a federal court, claiming diversity of citizenship and charging negligence on the part of the cab driver. By leave of court, the company impleaded the United States as a third-party defendant, charging that the negligence of the mail truck driver made the United States liable for all or part of the passenger's claims against the company. The court denied a motion by the United States to dismiss on the ground that the Federal Tort Claims Act does not authorize suits against the Government on derivative claims. The case was tried without a jury and judgments were rendered against the Yellow Cab Company for $7,800, and in its favor against the United States for one-half the several amounts awarded the passengers. The Court of Appeals for the Third Circuit affirmed denial of a motion to set aside the judgments.

No. 204 was a similar case in which a passenger aboard a Capital Transit streetcar was injured in a collision between the car and a truck driven by a soldier acting within the scope of his duties. Capital Transit impleaded the United States as a third-party defendant by leave of court. Later the third-party complaint was dismissed by the court on motion of the United States on the ground that it failed to state a claim on which relief could be granted against the United States. The Court of Appeals for the District of Columbia Circuit affirmed.

On writ of certiorari before the Supreme Court, Mr. Justice BURTON delivered the opinion of the Court affirming the judgment of the Court of Appeals for the Third Circuit and reversing the Court of Appeals for the District of Columbia Circuit. He declared that in No. 218, the court below had concluded that under Pennsylvania law a private individual would be liable to his joint tortfeasor for contribution; and that the United States, through the Federal Tort Claims Act, had consented to be sued and would be liable under the same circumstances and to the same extent. In No. 204, he observed that, while the court had decided that the United States could not be impleaded as a third-party defendant, it refrained from deciding whether the Government could be sued separately by Capital Transit.

In answer to the Government's argument that it could not be sued for contribution as a joint tortfeasor, even in a separate action, Mr. Justice BURTON said that the Federal Tort Claims Act waives the Government's immunity from suit "in sweeping language". The Act merely substitutes judgment of the district courts for private relief acts of Congress to compensate for injuries caused by negligence or wrongful acts of employees of the Government, he said. With such a clearly defined breadth of purpose toward increasing the scope of waiver by the United States of its immunity from suit, it would be "inconsistent to whittle it down by refinements", he said. A claim for contribution from a private joint tortfeasor could be enforced by the Government, he said, and it is "fair that this should work both ways".

As for the contention that the Government could not be sued as a third-party defendant, even though it could be sued separately, Mr. Justice BURTON says that there is nothing in the rights and obligations of joint tortfeasors to require such a distinction. The Federal Tort Claims Act expressly makes the Federal Rules of Civil Procedure applicable and Rule 14 provides for third-party practice, he declares. The procedural problems suggested by the Government, based on the fact that a plantiff may insist on a jury trial of his claim against the defendant, although the defendant has no right under the Federal Tort Claims Act to submit to the jury his claims over against the United States, are not insurmountable, he says.

The cases were argued by Frank F. Roberson for Capital Transit, by Bernard G. Segal for the Yellow Cab Company, and by James L. Morrison for the United States.

WORKMEN'S COMPENSATION

Test of Liability for Injuries Under Longshoremen's and Harbor Worker's Act Is Whether Obligation or Condition of Employment Creates Zone of Special Danger Out of Which Injury Arose

■ *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U. S. 504, 95 L. ed. Adv. Ops. 341, 71 S. Ct. 470, 19 U. S. Law Week 4138. (No. 267, decided February 26, 1951.)

Here the Supreme Court upheld an award of compensation made under the Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901. The award was made on a claim growing out of the accidental death of an employee of Brown-Pacific-Maxon, Inc., a government contractor operating on the island of Guam. One

Valak, an employee of Brown-Pacific-Maxon, Inc., was drowned when he plunged into the sea to rescue two men standing on reefs near the island, signaling for help. Valak had been spending the afternoon at the company's recreation center and was waiting for a company bus to take him from the area when he made the rescue attempt. The part of the sea into which he dived was so dangerous for swimmers that its use was forbidden and signs to that effect had been posted. O'Leary, the Deputy Commissioner for the Fourteenth Compensation District, awarded a death benefit of $9.38 a week to Valak's dependent mother, finding as a fact that "at the time of his drowning and death the deceased was using the recreational facilities sponsored and made available by the employer for the use of its employees and such participation by the deceased was an incident of his employment, and that his drowning and death arose out of and in the course of said employment". The District Court held that there was sufficient evidence to sustain the award. The Court of Appeals for the Ninth Circuit reversed, concluding that "The lethal currents were not a part of the recreational facilities supplied by the employer and the swimming in them for the rescue of an unknown man was not recreation. It was an act entirely disconnected from any use for which the recreational camp was provided and not in the course of Valak's employment."

The opinion of the Supreme Court was delivered by Mr. Justice FRANKFURTER. The Longshoremen's and Harbor Workers' Act authorizes payment of compensation for "accidental injury or death arising out of and in the course of employment", he said. The Court of Appeals' view that this standard precluded an award in this case was "too restricted an interpretation of the Act", he said. Workmen's compensation is not confined by common-law concepts of scope of employment, he continued, nor is the test of recovery "a causal relation between the nature of employment of the injured person and the accident". It is not necessary that "the employee be engaged at the time of the injury in activity of benefit to his employer", he observed. "All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose". Rescue attempts such as this are not necessarily excluded from the coverage of the Act, he said. The Court are satisfied that the evidence supports the Commission's findings here, he concluded.

Mr. Justice MINTON wrote a dissenting opinion in which Mr. Justice JACKSON and Mr. Justice BURTON joined. He said that the Deputy Commissioner's finding that the deceased was using the recreational facilities sponsored by the employer and that such use was an incident of his employment was "false and has no scintilla of evidence or inference to support it". "There can be no inference of liability here unless liability follows from the mere relationship of employer and employee." He called the attempted rescue "an isolated, voluntary act of bravery . . . in no manner arising out of or in the course of his employment". He declares that the employer is held to be liable in this case "because he is an employer".

The case was argued by Morton Hollander for petitioner, and by Edward S. Franklin for respondent.

Survey of Metropolitan Courts

(Continued from page 445)

Recorder's Court and the Circuit Court as to criminal nonsupport cases which result in divorce petitions, and between Circuit Court or Recorder's Court and Juvenile Court with regard to the handling of children whose parents are divorced or under the jurisdiction of the criminal tribunal for some criminal act involving the child, are extensively dealt with. The lack of co-operation among these courts is particularly striking and indicates a pressing need for the development of an over-all plan for integrating the courts within the Detroit metropolitan district.

Almost equally striking is the duplication and confusion between public agencies dealing with family casework, on the one hand, and child care and court administrative agencies supervising "social problem" cases, on the other. An example is cited in which half a dozen case workers, some from courts and some from public agencies, were all attempting to rehabilitate the same family.

The objective of the Judicial Administration Section has not been achieved by this survey, confined as it has been to a single area. To demonstrate the nature and extent of the metropolitan court problem as such, it will be necessary to know and compare the structural and factual patterns in several areas. Such further projects are now being planned.

Courts, Departments and Agencies

E. J. Dimock • EDITOR-IN-CHARGE

Army and Navy . . . Selective Service Regulations . . . amendment under which medical school, graduate school and college students may be deferred.

■ Executive Order No. 10230, March 31, 1951, Code of Federal Regulations, Tit. 32, Ch. XVI, §1622.10 (16 Fed. Reg. 2905).

Publication is made in the *Federal Register* of April 4, 1951, of amendment of the Selective Service Regulations to permit the classification of a registrant as engaged in activity necessary to the maintenance of the national health, safety or interest (1) if he has been accepted for admission to or is a student in a professional school of medicine, dentistry, veterinary medicine, osteopathy or optometry (2) if he is a full-time graduate student or (3) if he has been accepted for admission to a college or graduate school or has entered upon and is satisfactorily pursuing a full-time course of instruction in a college, and if he has either maintained a required scholastic standing, or has attained on a qualification test a score, or both, to be prescribed by the Director of Selective Service with the approval of the President.

Attorney and Client . . . disbarment . . . attorney allowed to collect for services rendered in personal injury suit before disbarment when reasons for disbarment were unconnected with suit.

■ *Stein v. Shaw,* N. J. Sup. Ct., March 20, 1951, Vanderbilt, Ch. J. (Digested in 19 U. S. Law Week 2430, March 27, 1951).

The issue in this case was whether a lawyer who was disbarred while prosecuting a personal injury action undertaken on a contingent fee basis could recover the reasonable value of the services rendered prior to his disbarment. Chief Justice Vanderbilt, speaking for the Court, ruled that, while the inability to perform discharged the express contract between the attorney and his client, a recovery in quasi-contract was possible, the express contract limiting the amount of recovery in quasi-contract. If an attorney's unprofessional conduct has not affected the suit the client would be unjustly enriched by a failure of the attorney's action for compensation. Furthermore, a contrary decision would result in retroactive punishment of an economic nature unrelated to the disciplinary action of disbarment proceedings. Committees on ethics and grievances should not have to consider "the extent of the attorney's pending business and the monetary value thereof". The Court stated: "To bring economic considerations into disciplinary proceedings would not only needlessly complicate them, but would in many instances serve to defeat the essential purpose thereof."

Justice Wachenfeld, dissenting, relied on the reasoning of *In re Woodworth,* 15 Fed. Supp. 291, aff'd. 85 F. (2d) 50, cited by the majority, but not followed. He believed that, even though the attorney's wrongful act was unrelated to the particular case, compensation should not be given when "[h]is inability to complete his contract has been brought about by his own wrongful conduct".

Constitutional Law . . . personal, civil and political rights . . . University of North Carolina directed to admit qualified Negro applicants to its school of law since the state Negro law school is inferior to the white.

■ *McKissick et al.* v. *Charmichael et al.,* C. A. 4th, March 27, 1951, Soper, C. J. (Digested in 19 U. S. Law Week 2468, April 4, 1951).

Reversing the judgment of the United States District Court for the Middle District of North Carolina (see 36 A. B. A. J. 1029, December, 1950 and 37 A. B. A. J. 378, May, 1951), the Court of Appeals for the Fourth Circuit held that the law school for Negroes established by the State of North Carolina does not offer Negro students the same advantages that they would receive from attendance at the white school; and thus that the segregation violates the equal protection clause of the Fourteenth Amendment. A comparison of the University of North Carolina Law School (hereinafter called the University) and the law school for Negroes, North Carolina College (hereinafter called the College), revealed substantial differences. The ten members of the University's faculty all had had at least ten years' experience in teaching law, received yearly salaries ranging from $6740 to $8500 if a full professor and amounting to $4500 if an assistant professor, served as advisers to the North Carolina legislative commissions and contributed legal articles to the *North Carolina Law Review* and other leading law reviews. On the other hand, only the Dean of the College had had ten years' experience teaching law, of the five faculty members, two received $4600, two $5040 and one $7000 per annum, and none of them had published any legal writing. Negro students since the last war had not participated in the activities of the *North Carolina Law Review*

EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

although they were allowed to contribute. Both schools were accredited by the North Carolina Board of Law Examiners and the American Bar Association and membership was expected for the College in the Association of American Law Schools but because of the smaller faculty the teachers at the College were required to teach a great variety of courses and did not have the opportunity to attain an especial degree of knowledge in any particular subject. The Court concludes: "These undisputed facts furnish abundant support for the opinion freely expressed by witnesses of outstanding experience and eminence in the law school field that the faculty of the University is superior to that of the College."

It was argued that white people were ordinarily not the clients of colored lawyers, but the court replied that success in the field of law required ability to understand human relationships as well as a mastery of the body of legal knowledge and that this ability could be better acquired by association with the 280 students of the University who "represent a cross section of the white people of the State who constitute 74 per cent of its population". Judge Soper states: "It has been said that the heart of legal education is found in discussion with one's associates." He finally points out that while North Carolina is sincere in its desire to provide higher education for Negroes, as evidenced by its voluntary establishment of the colored law school and spending $1460 yearly for each student in that school in contrast to the $416 spent on each student in the white law school, this effort only "serves to emphasize the great difficulty and expense involved in establishing equivalent schools in the higher reaches of the educational field rather than to show substantial equality in the present instance. The situation differs in circumstance but not in principle from the decision in *Sweatt* v. *Painter*, 339 U. S. 629 . . . ."

Corporations . . . revocation of charter . . . in libeling Negroes in violation of criminal statute corporation "exercises powers not conferred by law" despite charter purpose to educate as to customs and social standards.

■ *People of the State of Illinois* v. *The White Circle League of America*, Ill. Sup. Ct., March 22, 1951, Gunn, J.

A proceeding in the nature of *quo warranto* was brought by the People of the State of Illinois to oust The White Circle League of America, a nonprofit corporation, of its right to exercise a corporate franchise. The White Circle's purpose was to educate its members as to "customs, civic and social standards and charitable purposes. . . . " However, the People's complaint alleged that the White Circle disseminated "scurrilous and inflammatory attacks upon the Negro race in and about the city of Chicago" which were designed to arouse hatred for Negroes as a class. The Illinois Supreme Court had previously found a director of the corporation guilty of violating one of the statutes of the State of Illinois in *People* v. *Beauharnais*, No. 31719, January Term. Judgment on the pleadings was given for plaintiff in the Circuit Court of Cook County in the present case. The White Circle, in its answer to the complaint, had admitted the acts charged, attempting to justify its conduct, *inter alia*, as an exercise of the constitutional right of free speech.

The Court held that the constitutional right of free speech was not involved in the case, nor, as the People charged, was it a matter of whether the corporation had contravened public policy. Section 1, Ill. Rev. Stat. 1949, c. 112, Par. 9, provides that *quo warranto* proceedings may be brought if "(e) Any corporation does or omits to do any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises powers not conferred by law". Since the matter disseminated violated "several statutory provisions" the Court stated the issue as follows: "The question is therefore squarely presented whether the persistent violation of a criminal law by a corporation amounts to the 'exercise of powers not conferred by law,' which justifies the annulment of its charter by a *quo warranto* proceeding." Answering its own question, a unanimous Court ruled that, in publication and dissemination of libelous, scandalous or incendiary matter as part of a corporation's authorized purpose to educate as to customs and social standards, the corporation exercised powers not conferred by law. Although the People might proceed criminally for violation of the statute law, they might also use a civil action in *quo warranto* to oust the corporation of its charter. The Court stated: "The claim that the sole remedy of the People in cases of this kind is criminal prosecution is without merit."

Imposition of a fine not to exceed $25,000 is provided for by the statute relating to *quo warranto* (Ill. Rev. Stat. 1949, c. 112, Par. 14), as well as ouster, but the Court held that only a substantial fine would deter the corporation from its illegal activities and such a fine it could not pay.

Courts . . . district in which action must be brought . . . jurisdiction of information of libel actions is in territory where articles are seized . . . transfer of action by consent ineffective.

■ *Fettig Canning Company* v. *Steckler, Judge of the United States District Court for the Southern District of Indiana*, C.A. 7th, March 21, 1951, Major, Ch. J. (Digested in 19 U.S. Law Week 2448, April 3, 1951).

A petition of mandamus, directed to a judge of the United States District Court for the Southern District of Indiana, to show cause why he should not retain jurisdiction of an information of libel action instituted under §334 of the Federal Food, Drug and Cosmetic Act was dismissed since he had properly remanded the case to the District Court for the Eastern District of Missouri. The libeled articles were seized by the Government within the jurisdiction of the Missouri district court, but the

claimant of the seized articles and the United States District Attorney for the Missouri District had agreed to transfer the action to the Southern District of Indiana, whence the goods had originally been shipped. Claimant contended that under 28 U.S.C. §1404 (a) providing: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought", the place of trial might have been in any district where the goods could have been seized. This could have occured either at the place of shipment, Indiana, or at any other time thereafter as the goods traveled to Missouri. The Court noted, however, that §334 (a) specifically provides that libel actions are to be instituted "in any district court of the United States within the jurisdiction of which the article is found" and so held that jurisdiction could be acquired only by the Missouri district court in whose territory the articles were seized. The Court stated: "Congress has not seen fit to make jurisdiction dependent upon where the seizure might have taken place but has expressly conferred jurisdiction upon the court of the District wherein the articles are found."

The agreement to transfer was held ineffective since the matter was one of jurisdiction rather than venue.

Labor Law . . . National Labor Relations Act . . . elections ordered in single craft unit of employees of an associated group of employers in the building construction industry . . . consistency requires the NLRB to assume jurisdiction of certification cases in the construction industry since it has already asserted jurisdiction of unfair labor practice cases there.

■ *In re The Plumbing Contractors Association of Baltimore, Md., Inc., et al., and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the U.S. and Canada, Local No. 48, AFL,* Cases Nos. 5-RC-94, 95, 96, 700, NLRB, April 2, 1951.

■ *In re Plumbing and Heating Contractors Association of Olean, N.Y., and Local Union 500 of The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the U. S. and Canada, AFL,* Case No. 3-UA-626 NLRB, April 2, 1951.

An election to determine whether the plumbers, plumbers' apprentices, and gasfitters employed by members of The Plumbing Contractors Association of Baltimore, Maryland, Inc., desire to be represented, for purposes of collective bargaining, by the United Association of Journeymen and Apprentices of the United States and Canada, Local No. 48, AFL, has been ordered by the National Labor Relations Board. Also ordered was a union-shop authorization election for plumbers, steamfitters and their apprentices employed by members of the Plumbing and Heating Contractors Association of Olean, New York. In the decision the Board announced that it was here "for the first time confronted with the question of whether it should direct an election in a proposed single craft unit of employees employed in the actual construction operations". Eight American Federation of Labor international unions in the building construction industry opposed the conduct of the elections because they argued that if jurisdiction was asserted a flood of election petitions would be started from other unions in the industry. However, the Board held, it is for Congress to determine the desirability of excluding the industry from the election provisions and certification procedure provided for in the National Labor Relations Act. The Board does not have discretion to afford special treatment to this particular industry. In the past jurisdiction was asserted for the purpose of preventing unfair labor practices from arising in the industry and it would be inequitable to refuse the petitioning labor organization the advantages accruing from the certification procedure. The Board said: "We do not believe that Congress intended that in this industry the Board would wield the sword given it by the Act, but that labor organizations desiring it should be denied the shield of the Act. We believe, rather, that in providing that certain benefits would flow from certification, Congress intended that the shield should go with the sword, and that the Board should to this end assert jurisdiction in representation and union-security authorization cases to the same extent and on the same basis as in unfair labor practice cases."

The eight unions also contended that the success of the privately organized National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry in settling jurisdictional disputes voluntarily submitted to it by employers and unions would be impaired. The Board replied that this decision was not a jurisdictional award and would not prevent employers from determining the content of their employees' work assignments so that the Joint Board's powers in this area had not been affected.

Monopolies . . . interstate commerce . . . civil action under Sherman Act dismissed because violation did not result in damage to plaintiffs . . . action under Clayton and Robinson-Patman Acts dismissed because violations did not occur "in the course of [interstate] commerce".

■ *Myers et al.* v. *Shell Oil Company,* U.S.D.C. S.D. Calif., April 5, 1951, Carter, D.J. (Digested in 19 U.S. Law Week 2477, April 17, 1951).

Operators of gasoline service stations located in Los Angeles brought an action for treble damages against the oil company with which they had exclusive dealing contracts, but the Court, after examining plaintiffs' complaint and defendant's affidavits, granted defendant's motion for summary judgment. The action was based on §§ 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1 and 2), § 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 13), and § 3 of the Robinson-Patman Act (15 U.S.C. § 13a). The operators alleged that the con-

tracts deprived them of the right to purchase petroleum products at prices determined by free competition among the producers and this conduct had affected gasoline prices throughout the Western states area. Prices in that area are determined by adding to the Los Angeles gasoline price the transportation charges to the point of distribution. Accepting these statements as true, the Court nevertheless failed to find the necessary causal connection between defendant's violation of the Sherman Act and plaintiffs' injury. It said: "Plaintiffs have alleged no facts... from which it can be determined that plaintiffs have been injured because of the defendant's exclusive dealing contracts." Assuming that the exclusive dealing contracts with plaintiffs affected the price of gasoline in other states and thus affected interstate commerce, the Court said that nevertheless plaintiffs were not injured by the effect of exclusive dealing contracts on the prices in other states.

Plaintiffs' cause of action was also based upon allegedly discriminatory activities by the oil company which violated the Clayton Act and the Robinson-Patman Acts. However, the specific language of § 3 of the Robinson-Patman Act states that the prohibited acts must be performed by persons "engaged in [interstate] commerce" and "in the course of such commerce". Passing the question whether plaintiffs were injured by the allegedly prohibited acts, the Court held that the acts were not performed in the course of interstate commerce. Although 15 per cent of the crude oil for defendant's California refineries was purchased outside California, all the gasoline sold plaintiffs was refined in California. The Court concludes: "Thus, plaintiffs' allegation as to the source of the oil does not bring the conduct complained of in the course of interstate commerce as provided for in the Clayton and Robinson-Patman Acts, because the petroleum products here involved were refined in California and sold and delivered to plaintiffs within the state of California. The transactions between the plaintiffs and the defendant were therefore wholly intrastate in character."

Public Officers . . . university professors . . . professors in University of California are persons holding "office or public trust" within meaning of constitutional prohibition of exaction from such persons of any declaration or test other than constitutional oath of office.

■ *Tolman et al.* v. *Underhill and the Regents of the University of California, etc., et al.*, Calif. District Court of Appeal for the Third Appellate District, April 6, 1951, Peek, J.

Professors whose appointments to the faculty of the University of California were withheld because of their refusal to sign statements of their loyalty required by the Board of Regents along with the constitutional oath of office as a condition of employment at the University, sued for a writ of mandate to compel the Board to issue them letters of appointment to their regular positions as members of the faculty. It was conceded that none of the petitioning professors belonged to the Communist Party or were in any way subversive or disloyal. Part of the statement required contained the clause "...I am not a member of the Communist Party or any other organization which advocates the overthrow of the government by force or violence . . . ." Justice Peek, speaking for a unanimous court, held that the statement demanded violated § 3 of Article XX of the California Constitution which prescribes the oath for all state officers and concludes with the prohibition that "no other declaration or test, shall be required as a qualification for any office or public trust". The Board of Regents argued that members of the faculty did not hold office or positions of public trust and so §3 of Article XX was not applicable to them. Justice Peek, however, found a standard by which to decide that question in §9 of Article XX which provides: "The university [of California] shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs . . . ." He held that the framers of the California Constitution intended to have members of the faculty included in the protection afforded by §3 of Article XX as persons holding "office or public trust". The Court states: "...if the faculty of the University can be subjected to any more narrow test of loyalty than the constitutional oath, the constitutional mandate in §9 of Aricle IX would be effectively frustrated, and our great institution now dedicated to learning and the search for truth reduced to an organ for the propagation of the ephemeral political, religious, social and economic philosophies, whatever they may be, of the majority of the Board of Regents of that moment." The Court held that the petitioners need only take the constitutional oath to uphold the Federal and State Constitutions required of public officials of the State of California.

Radio Communication . . . licenses . . . policy stated with respect to violators of federal law . . . FCC will consider motion picture companies' refusals to make films, stories or actors available for use by television stations in determining such companies' qualifications to operate television stations.

■ *Uniform Policy To Be Followed in Licensing of Radio Broadcast Stations in Connection with Violation by an Applicant of Laws of the United States Other Than the Communications Act of 1934*, Docket No. 9572, FCC, March 28, 1951.

Oral arguments were heard by the Federal Communications Commission on the relevancy of violations of laws of the United States, other than the Communications Act of 1934, by applicants for broadcast station licenses, and a report issued announcing the Commission's policy. Under §§307 (a), 309 (a) and 310 (b) of the Communications Act, applications are granted only if the "public interest, convenience or necessity" will be served and in *Mansfield Journal Co.* v. *Federal Trade Commis-*

sion, 180 F. (2d) 28 (36 A.B.A.J. 225) it was pointed out that violations of federal laws are important considerations in evaluating ability to serve the public. However, no "blanket policy" that would automatically and absolutely disqualify the applicant will be adopted. Some of the factors which will be considered in determining on a "case-to-case" basis the merit of an application are as follows: whether the violation was intentional or inadvertent, whether there was a single infraction or a continuing pattern of illegal action and whether the violation was recent or remote. Factors that will be immaterial to the Commission's decisions are whether the finding of violations was in a civil or criminal case, whether the decree was one by a lower or appellate court, and in instances where there has been no adjudication of a violation, whether a suit has or has not been instituted.

With the observation "[a] somewhat related matter in so far as motion picture companies are concerned merits some discussion", the Commission took up the question of the relation of such companies to television. Refusal to make films, stories or actors available for use by television stations are pertinent considerations in determining the qualifications of such applicants. The Commission stated: "It is obvious that the success of television will depend to a large measure on the ability of television stations to acquire the best available films and to utilize the best available talent and stories in their programs. Motion picture companies, of course have the same interest. When a television station is owned by a licensee other than a motion picture company, it will compete vigorously with the motion picture companies to secure the best available films, talent and stories for use over his station. Where a television station is owned by a motion picture company which imposes restrictions on the use of films, talent or stories on television stations, obviously a conflict of interest is created and the conflict is likely to be resolved against the television station where the investment in the motion picture part of the enterprise is greater than in the television properties. In such a case, a serious policy question is presented as to whether the Commission fulfills its obligation to encourage the largest and most effective utilization of television in the public interest when it licenses the station to a person with an obvious conflict of interest which can prevent him from utilizing television to its utmost."

Commissioners Jones and Hennock did not participate.

Wage Stabilization Board . . . Executive Order amended . . . Wage Stabilization Board given jurisdiction of "any labor dispute" not resolved by previous collective bargaining, conciliation or mediation which threatens the national defense and is submitted to it by either the President or the parties involved.

■ Executive Order No. 10233, April 21, 1951, Code of Federal Regulations, Tit. 3, Ch. II, §§1-4 (16 Fed. Reg. 3503).

Upon the recommendation of the National Advisory Board on Mobilization Policy (see 36 A.B.A.J. 1034; December, 1950), the President set up the Wage Stabilization Board, to consist of eighteen members appointed by him, six representing the public, six, industry, and six, labor. The Executive Order stated that the President was using the authority vested in him by the "Constitution and statutes, including the Defense Production Act of 1950, and as President of the United States and Commander-in-Chief of the armed forces".

Any labor dispute "not resolved by collective bargaining or by the prior full use of conciliation and mediation facilities and which threatens an interruption of work affecting the national defense" may be referred to the Board by agreement of the parties to the dispute or the President, if he believes that the dispute "substantially threatens the progress of national defense". However, the Board's recommendations are not binding unless the parties agree to be bound by its decision. The recommendations, to be made after an investigation of the issues in dispute, are to contain "fair and equitable terms of settlement", but no action "inconsistent" with the Fair Labor Standards Act of 1938 or the Labor-Management Relations Act, 1947, is to be taken.

Publication of the Executive Order was made in the *Federal Register* of April 24, 1951.

Further Proceedings in Cases Reported in This Division

■ The following action has been taken in the Supreme Court of the United States:

AFFIRMED, April 23, 1951: *California State Automobile Association Inter-Insurance Bureau* v. *Downey*—Insurance (36 A.B.A.J. 573, July, 1950; 37 A.B.A.J. 68, January, 1951).

AFFIRMED, April 30, 1951: *Bailey* v. *Richardson et al.*—Constitutional Law (35 A.B.A.J. 774, September, 1949; 36 A.B.A.J. 405, 410, 682, May, August, 1950).

REVERSED, April 30, 1951: *Joint Anti-Fascist Refugee Committee* v. *McGrath et al.*—Constitutional Law (35 A.B.A.J. 849, October, 1949; 36 A.B.A.J. 410, May, 1950); *International Workers Order, Inc., and Drayton* v. *McGrath et al.*—Constitutional Law (36 A.B.A.J. 406, 1035, May, December, 1950).

PROBABLE JURISDICTION NOTED, April 30, 1951: *The Lorain Journal Co. et at.* v. *U. S.*—Monopolies (36 A.B.A.J. 936; November, 1950).

CERTIORARI DENIED, April 16, 1951: *Westinghouse Radio Station, Inc. et al.* v. *Felix*—Libel and Slander (36 A.B.A.J. 494, June 1950; 37 A.B.A.J. 147, 150, February, 1951).

CERTIORARI DENIED, April 23, 1951: *Thompson et al.* v. *Wallin et al.*—Constitutional Law (36 A.B.A.J. 136, 407, 410, February, May, 1950; 37 A.B.A.J. 68, January, 1951).

CERTIORARI DENIED, April 30, 1951: *Claughton* v. *Gratz* — Corporations (37 A.B.A.J. 290; April, 1951).

■ The following action has been taken by the United States Court of Appeals for the First Circuit:

AFFIRMED, March 29, 1951: *McGarty* v. *O'Brien*—Constitutional Law (37 A.B.A.J. 375; May, 1951).

■ The following action has been taken by the United States Court of Appeals for the Fourth Circuit:

AFFIRMED, April 2, 1951: *Madsen* v. *Kinsella*—Army and Navy (36 A.B.A.J. 934; November, 1950).

■ The United States Court of Appeals for the District of Columbia Circuit, on April 12, 1951, dismissed for mootness the Government's appeal from a decree adjudging the International Union, United Mine Workers of America, not guilty of contempt. *U. S.* v. *International Union, United Mine Workers of America*—Labor Law (36 A.B.A.J. 316; April, 1950).

Department of Legislation

Harry W. Jones, Editor-in-Charge

Further Notes on the Presidential Powers Issue

■ A note published two months ago in this Department of the JOURNAL (37 A.B.A.J. 301; April, 1951) traced the developments in the "great debate" from Senator Wherry's introduction of Senate Resolution 8, declaring it to be "the sense of the Senate that no ground forces of the United States should be assigned to duty in the European area...pending the adoption of a policy with respect thereto by the Congress", to the conclusion of the joint hearings of the Senate Committees on Foreign Relations and Armed Services. The furious controversy over President Truman's dismissal of General MacArthur has widened the focus of attention from the troops-to-Europe issue to the entire matter of world-wide American strategy for the containment or defeat of Communism. To what extent is Congress to participate in future foreign policy decisions requiring the overseas assignment of American military personnel? The course of discussion and final decision of the Senate on the committee substitutes to the Wherry Resolution underline the problems involved in any attempt to secure an effective expression of congressional views in matters arguably within the constitutional power of the President as Commander in Chief of the Army and Navy of the United States.

The narrative necessarily left unfinished in the earlier installment of this article can best be resumed at March 8, when the joint Foreign Relations-Armed Services Committee voted 23-0 to report Senate Resolution 99 as a substitute for the Wherry proposal. At the same time, the Committee voted 16-8 also to report a concurrent resolution (S. Con. Res. 18) identical in terms except for its several references to "the sense of the Congress" instead of "the sense of the Senate". By parliamentary agreement, Senate consideration of the concurrent resolution was postponed until after action on the "simple", *i.e.*, Senate, resolution. Ultimately, on April 4, the Senate adopted amended versions of both resolutions, the text of the two, as passed, being exactly the same except for the "sense of the Congress" phraseology in the concurrent resolution and the addition to it of a commendatory reference to Turkey and Greece.

Floor debate on Senate Resolution 99 and the many amendments proposed to it began on March 16 and occupied almost the full time of the Senate during the next twelve days it was in session. The transcript of the debate takes up almost 400 pages in the *Congressional Record*. This vast amount of Senate rhetoric and parliamentary maneuvering cannot possibly be compressed within the space limits of this Department. But the essential flavor of the discussion should be pretty well suggested by a brief account of two phases of the debate: *first*, the running controversy concerning the wording of the crucial Paragraph 6 of the Resolution; and, *second*, the dispute whether the action of the Senate should be in the form of a simple resolution, a concurrent resolution, a joint resolution or bill, or some combination of these devices. If these seem supertechnical or legalistic issues, it must be kept in mind that the Senate was addressing itself to the great no-man's-land in American constitutional law and that the individual members of the Senate were of many minds concerning the President's asserted inherent powers and the propriety of various forms of attempted congressional restriction on executive freedom of action.

McClellan Amendment Required Approval for Over Six Divisions

The essential sixth paragraph of the Resolution, as reported by the committees, provided in full as follows:

> It is the sense of the Senate that, in the interests of sound constitutional processes and of national unity and understanding, congressional *approval* should be obtained of any policy requiring the assignment of American troops abroad when such assignment is in implementation of Article 3 of the North Atlantic Treaty; and the Senate hereby approves the present plan of the President and the Joint Chiefs of Staff to send four additional divisions of ground forces to Western Europe. [Italics added].

The inclusion of this paragraph in the reported Resolution was a preliminary defeat for the Administration forces, since the original draft proposed by Chairman Connally of Foreign Relations and Chairman Russell of Armed Services had expressed an understanding that the President "will *consult*" with the appropriate House and Senate committees but had carefully avoided any mention of congressional *approval*.

Much of the Senate floor discussion, particularly during the first three days, centered on the ambiguities of Paragraph 6. Almost every Senator participating in the debate registered a different interpretation of the paragraph. At length, the disagreements sharpened to this specific issue: Is Paragraph 6 intended to impose an obligation on the President to obtain congressional approval only of a new or changed *policy* involving ground troop assignments, or is it intended that congressional approval be secured, even in the absence of a policy change, with respect to any Western European assignment of ground troops exceeding the two divisions already there and the four additional divisions expressly authorized by the last clause? One has only to read the paragraph, as set out above, to see its ambiguity on the basic question. After bitter resistance by Administration forces and their Republican allies, all doubts concerning the intendment of the paragraph were settled by the McClellan Amendment, which added the following clause at the end of Paragraph 6:

> but it is the sense of the Senate that no ground troops in addition to such four divisions should be sent to Western Europe in implementation of Article 3 of the North Atlantic Treaty without further congressional approval.

This is the amendment characterized by Senator Lodge as an attempt to "convert the Senate into an operations section of a general staff". Sound or unsound, it passed the Senate by a vote of 49-43 and constitutes by far the most significant respect in which the Resolution as adopted differs from the committee version.

Differences Account for Dispute Over Form of Senate Action

The issue whether the Senate's action should be in the form of a simple resolution or in some other parliamentary form deemed more authoritative and "binding" was raised first at committee executive sessions. An effort to have the committees report a joint resolution was defeated 13-11, and the unprecedented compromise decision was to bring out the twin simple and concurrent resolutions. The issues here are highly technical and require a few words of explanation. A congressional joint resolution is, for all practical purposes, indistinguishable from a bill, and the enactment of a joint resolution is a lawmaking act in the full sense. A simple resolution of one House, or a concurrent resolution passed by both houses, is not a full-fledged legislative act since, in theory, simple and concurrent resolutions do not have "the force of law". It was therefore assumed by both sides in the present debate that congressional enactment of a joint resolution calling for executive consultation with Congress on troops-to-Europe decisions, or for actual congressional approval, would constitute a more direct and unequivocal challenge of any claim of presidential power to act independently and without interference from Congress. Further, since a joint resolution requires the signature of the President, enactment of the substance of the troops-to-Europe measure as a joint resolution of the Senate and House would have forced the President either to sign the joint resolution, so acknowledging a constitutional right in Congress to impose limitations on foreign troop assignments, or to veto it and so manifest a determination to pursue his course of action in flat disregard of congressional mandate.

From the first day of the debate on Senate Resolution 99, Republican critics of Administration foreign policy attacked the parliamentary form of the committee resolutions as "of no binding effect on the President", "a mere moral obligation", "a pious petition", "a hope", and even "a fraud and a hoax". Finally, on the next to last day of the debate, the Senate proceeded to consider a motion by Senator Bricker to return Senate Resolution 99 to the joint committee with instructions to report back forthwith a joint resolution in the same essential terms. This time Administration lines held firm, only one Democratic Senator voting with the opposition, and the Bricker motion was defeated by a vote of 56-31. Thirteen Republican Senators voted with the Democrats, most of them with the careful statement that they would have preferred a joint resolution in the first place but thought that a remand of the Resolution to the committees at this late stage would cause great delay and might well be interpreted abroad as a retreat from the collective security program of the North Atlantic Treaty.

On the presidential powers issue, the Foreign Relations-Armed Services committee report contained this cautious sentence:

> With the exact line of authority between the President and the Congress in doubt for the past 160 years, the committee did not endeavor to resolve this issue definitively at this time. [S. Rep. No. 175, 82d Cong., 1st Sess., page 19].

It is equally true that nothing approaching a definitive resolution of the great constitutional issue came out of the hard fought and extended debate preceding the adoption of Senate Resolution 99. In the lengthy record of the debate it is often very difficult to discern the thread of principle running through the fabric of partisan politics. But it is profoundly disturbing to hear the whole course of Senate consideration of this Resolution stigmatized as "legalistic quibbling" or "Senate backseat driving". One can be skittish about claims of exclusive executive power in this great field of decision without espousing the foreign policy views of Senator Wherry or Senator Taft. The legislative history of Senate Resolution 99, read without cheap cynicism, is, in part at least, a meaningful record of the groping efforts of a representative body to find some appropriate and effective device for the assertion of its right to be heard on the one all-controlling question of national policy.

Activities of Sections and Committees

COMMITTEE ON AMERICAN CITIZENSHIP

■ By the By-Laws of the Association this committee is given jurisdiction of "all questions in the field of American citizenship and of the American form of government with respect to public education and understanding of both the privileges and responsibilities thereof". It has been the continued view of the present committee that the most practical way for the committee to work with reasonable chance of accomplishing desired results would be to enlist the interest of state and local bar associations and to act through them. No type of education can be handled except through contacts in the field. State and local associations are familiar with the particular problems of their several communities. An approach in one community might be successful which would not work at all in another community.

Accordingly, a program was adopted in the spring of 1950 under which copies of memoranda and bulletins have been prepared and distributed to representatives of the American Bar Association, of the Junior Bar Conference, and of state associations throughout the country. These bulletins regularly include information as to the activities of state and local associations which are considered useful to other associations, and also materials on which programs, addresses and other local activities may be based.

The April committee bulletin contained, for example, information as to the activities of the Arizona, Brooklyn, Connecticut, Louisiana, Nebraska, New Jersey, Philadelphia, and Texas associations, including complete copies of the report of the Nebraska association, a radio program presented by the New Jersey association, and an outstanding report of the Philadelphia citizenship committee covering a proposed survey to be made of citizenship activities in that city.

COMMITTEE ON CIVIL SERVICE

■ At the last Annual Meeting, the House of Delegates' consideration was postponed, at the request of the Section of Taxation, of the committee's Recommendation 2 (c) that all officials in the Treasury Department below the rank of Assistant Secretary should be appointed from the career service without Senate confirmation. This recommendation of our Committee appears on page 45 of the Advance Program for the Washington meeting in September, 1950. As there stated, it follows a recommendation of the Hoover Commission. The committee has been in correspondence with officers of the Section of Taxation who questioned whether Collectors of Internal Revenue and others in that Department should be so appointed; but, to date, as is usual in argument, neither side has convinced the other. Recommendation 2 (c) will, therefore, be called up for approval by the House of Delegates at the Seventy-fourth Annual Meeting in September, 1951.

Recommendation 3, which was adopted by the Association, deals with veterans' preferences in the civil service and indicates that these are too great under existing law (see page 46, Advance Program, Washington meeting, 1950). The help of the committee has been sought by The National Association of Federal Career Employees in behalf of Senate Bill 455 and reintroduction of S. 660, referred to at page 46 of the Advance Program. However, the committee has not had copies of the proposed Bill furnished and, not knowing what is the present situation with respect to legislation, was not, therefore, able to meet the deadline for recommendation to the Board of Governors for their May meeting.

But, our committee, in suggesting revisory legislation, is in accord with the recommendation of the United States Civil Service Commission (Sixty-seventh Annual Report (printed) for fiscal year ended June 30, 1950, pages 6-7).

The Committee's recommendation (Advance Program 1950, page 45) in effect asked the Special Committee on Scope and Correlation to recommend how the work of our committee, particularly regarding selection of hearing examiners for various administrative agencies, could be coordinated with the work of Sections and other committees of the Association. This recommendation was approved (36 A.B.A.J. 959, November, 1950), but the request has not yet been complied with.

The committee calls to the attention of the Association as a matter of interest, Public Law 873, 81st Congress, c. 1123, 2d Sess. (H.R. 7824), September 30, 1950, providing for "performance ratings" in place of the "efficiency ratings" previously given to civil service personnel. This legislation carries out a recommendation of the Hoover Commission.

The committee continues to ask the sympathetic interest of officers and members of the Association and will be grateful for suggestions and information respecting its work.

SECTION OF PUBLIC UTILITY LAW

■ The members of the Section of Public Utility Law held their spring business meeting and social outing at The Cloister Hotel, Sea Island, Georgia, May 4-7. Among the business items considered were the Section's program for the Annual Meeting in New York, the membership drive, and the preparation of the Report of the Standing Committee of the Section.

SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW

■ On February 20, 1951, Eugene S. Lindemann, former Chairman of the Section of Real Property, Probate and Trust Law, unexpectedly passed away. Henry B. Pflager was elected Chairman at the Spring Meeting of the Council held in New York on April 6 and 7. The Council also tentatively approved, as part of its September Section meetings, a joint meeting to be held on Tuesday afternoon between the Real Property Division of the Section and the Municipal Law Section. Dean Fordham, Chairman of the Municipal Law Section, and Rush Limbaugh, Chairman of the Real Property Division, are in general, although not final, agreement, that the subject will be "The General Program of Slum Clearance". This will be developed by the following more specific subject headings on which papers and addresses will be given:

1. Land Assembly – Negotiation for Purchase and Condemnation.
2. Effect of a Redevelopment Program upon Private Restrictions in Deeds and Plats and upon Existing Zoning and Other Public Restrictions upon Land Use.
3. Methods of Financing Land Acquisitions.
4. The Tax Factors Involved in Connection with Such a Program.
5. Elimination of Nonconforming Uses as a Zoning Problem.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.**

The Lawyer and Excess Profits Tax

■ Too many lawyers have washed their hands of the excess profits tax under the erroneous impression that it is primarily a matter of statistics and figures rather than law. True, the accountant must play a leading role in making the various computations of excess profits, net income, credit, etc. But it is equally true that certain areas of this highly complex tax should be chiefly the lawyer's concern. A corporation faced with excess profits tax problems will undoubtedly fare best under the guidance of a lawyer-accountant team.

The space limitations of this article make it impossible to provide comprehensive coverage of the areas where a lawyer should lead the way. It may be said generally, though, that Parts II and III of the Excess Profits Tax Act of 1950 are packed with legal problems. They control the computation of the earnings and invested capital credits where the taxpayer corporation has previously been involved in some change of business form, such as mergers, split-ups, consolidations, liquidations, incorporations of partnerships or individual proprietorships, etc. These provisions might be described as the excess profits tax counterparts of the income tax reorganization and basis sections.

In evaluating both the lawyer's duties and opportunities in connection with the various changes in business form covered by Parts II and III, note that the transaction will almost certainly have been handled by a lawyer originally. That lawyer will have the files, will know all the pertinent details and will be in the best position to advise concerning any possible excess profits tax implications of the transaction. Because of this, any law firm which has handled a substantial number of mergers, split-ups, incorporations, etc., in the past, might do well to set up a regular excess profits tax procedure. This might take the form of listing all the types of transactions covered in Parts II and III. Alongside each would be noted the possible effects on average earnings credit, invested capital credit, basis, etc. The office files could then be checked against this master outline to show how various corporate clients may be affected. Finally, these implications should be discussed with each client and its accountant.

A project of this sort is perfectly feasible despite the fact that March 15, the due date for calendar year returns, is long past. In the first place, the Bureau was quite liberal in granting extensions of time for filing returns. Secondly, the taxpayer is perfectly free to submit an amended excess profits tax computation switching from the invested capital to the average earnings credit or vice versa, at any time until the statute of limitations runs on the year. For calendar year corporations, this will ordinarily permit a switch to be made in the 1950 tax determination as late as March 15, 1954. Consequently, it is not too late for any lawyer to lend both his knowledge and talents to the important job of holding to a legal minimum the excess profits tax of his corporate clients.

Take, for example, the case of a corporation which receives assets in the tax-free liquidation of its subsidiary corporation. The amount at which these assets may be included in equity capital under the asset invested capital credit depends on whether the taxpayer corporation had a cost basis or a basis other than cost for the subsidiary's stock. If it is a cost basis, the assets acquired from the subsidiary take that cost of

the stock in computing equity capital. If it is a basis other than cost, the assets are taken at their basis to the liquidated subsidiary. To complicate the matter further, the meaning of cost basis for this purpose is not the same as for income tax purposes. Thus, the taxpayer corporation may have a cost basis for equity capital purposes and a substituted basis for income tax purposes.

An illustration of this situation would be where corporation *P* turns over machinery which it has purchased, to its newly formed subsidiary *S* in exchange for all of *S*'s stock. *P* will have a cost basis for the *S* stock for equity capital purposes, a substituted basis for income tax purposes.

Another example of the purely legal complexities of the excess profits tax is found in the rules for computing the historical invested capital credit where the taxpayer corporation has acquired property in certain corporate reorganizations or related transactions. In computing its credit, it may be essential to know not only whether the tax law in effect at the time of the exchange provided for a carry-over of basis from the transferor to the taxpayer, but whether the tax laws from that date up to and including the current taxable year have provided for a carry-over of basis even though the law at the time of the transfer did not. The regulations on this section of the excess profits tax law leave open the difficult question of what to do with judge-made changes in law which tended to narrow the sphere of tax-free exchanges while statutory law was developing in the opposite direction. This whole problem obviously requires the type of research and analysis which is right down the lawyer's alley.

Another excess profits tax area of clearly legal nature is that dealing with inconsistent positions. In arriving at its credits, taxpayer corporation is entitled to a correct computation of its income and capital transactions of the past years even though they were erroneously reported in those earlier years. The cost of taking such an inconsistent position is to pay up any additional income tax which might have been due in the earlier years under the correct method, even though those years are now closed by the statute of limitations. A decision to take an inconsistent position now for the purpose of building up the excess profits credit depends on how much is to be saved in excess profits tax as compared to the additional income tax. The key to this entire adjustment depends on there having been an erroneous position taken in earlier years. And that is a straight matter of law.

This problem arises in more complicated form when taxpayer corporation has previously been involved in a change of business form which makes it an acquiring corporation with some other corporation, partnership or individual proprietorship its component corporation. In that case, the comparison of present and past determinations of income and capital transactions must also take into account how the component handled these matters in earlier years.

Apart from this historical type of service, the lawyer also has an extremely important function in advising on the excess profits tax consequences of projected transactions involving mergers, liquidations and other forms of business changes. For example, a parent corporation may have some nontax reason for liquidating a subsidiary corporation. Suppose also that the subsidiary has a high invested capital credit because of high basis assets whereas the parent has a low cost basis for the subsidiary's stock. The lawyer who is asked to handle the liquidation is in the best position to advise the taxpayer corporation that its over-all excess profits credits would be reduced as a result of the liquidation. It could then take the additional tax cost into consideration before final action.

To sum up, this article has only scratched the surface of the legal problems created by the excess profits tax. It should be obvious, however, that there is a real need for a lawyer's contribution in the successful handling of excess profits tax problems.

Contributed by Committee Member Leon Gold

Dallas Regional Meeting

(Continued from page 439)

The convention and ensuing activities were an outstanding contribution to the continued harmony between the organized Bar and the general practitioner. It brought to the Southwest a virtual "Who's Who" among American legal leaders and provided the Bar with constructive criticism from lay leaders such as Mr. Luce.

The meetings themselves were an undying tribute to Burt J. Thompson and his regional convention committee, and to the remarkable drawing power of Mr. Storey, his regional steering committee and the special arrangements committees of the Dallas Bar.

Given the correct formula for a successful convention, including the ingredients of inspiration, practicality, fellowship, entertainment and name attractions, the Southwestern Regional Convention proved conclusively that lawyers will assemble on the native soil and will admit an enlightening stimulation therefrom.

It proved another thing too. Texas retains its boast of bigness!

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Mr. Gardner Asks, "Who's Naïve?"

■ I have read J. Edward Thornton's letter [see 37 A.B.A.J. 238; March, 1951] with considerable interest.

Mr. Thornton says I am naïve, and that a bunch of *"self-appointed Dick Tracys and amateurs"* are trying to plug loopholes in our legal system.

My associates are not "amateurs". If Mr. Thornton would even glance at Dr. LeMoyne Snyder's book *Homicide Investigation,* he would find that Dr. Snyder is one of the most highly specialized crime investigators in the country; or if he would read Rupert Hughes' *The Complete Detective,* he would find that Raymond Schindler is one of the most competent and experienced detectives in the country. If he would then investigate the qualifications of the other members of the committee and still feel he could fool it *"with an apparent objective statement of facts about my unfortunate client in the penitentiary",* he is more than merely naïve. He is an incurable optimist.

In the February, 1951, issue of *The Atlantic Monthly,* Donald P. Wilson, who has devoted years to a study of the situation, asserts that according to one survey nearly one-third of the prison population is in on false charges. Some of this situation is due to deliberate frame-ups by police stool pigeons.

Personally, I am inclined to lift an eyebrow over these statistics, but the author knows a lot more about it than I do.

I do know that men are wrongfully convicted. If Mr. Thornton will take the trouble to look in the back files of *Argosy* he will find that Louis Gross was liberated after serving some seventeen years on a life sentence for a murder which was committed by another person; that Clarence Boggie served thirteen years on a life sentence for a murder which was committed by someone else.

I cite the cases of these men because in each instance these penniless men had exhausted all of their legal remedies and would normally have spent the rest of their lives in the penitentiary if it hadn't been for the "amateur, self-appointed Dick Tracys".

Anyone who is interested might profitably read Professor Edwin M. Borchard's book *Convicting the Innocent,* and the large number of documented cases reported therein.

The work of my associates is going to continue regardless of the amount of co-operation we get from lawyers on the one hand or the amount of opposition on the other; but, as pointed out in my article, it would help the cause of justice and the reputation of the Bar generally if lawyers interested themselves more in justice and less in fees.

Our program is in a formative stage. We need lots of suggestions, but the type of criticism contained in Mr. Thornton's letter is wide of the point.

There's not much use talking about better public relations for the Bar unless the Bar actually *does* something to justify a better relationship.

I have no particular argument with Mr. Thornton. I simply don't want readers of the JOURNAL to think Mr. Thornton's criticism as expressed in his letter is a significant contribution to the discussion so long as his basic premise remains incorrect.

ERLE STANLEY GARDNER

Temecula, California

Thinks Oath for Lawyers Is Unconstitutional

■ The Association has been strangely indifferent to the grave possibility that the anti-Communist oath which it has recommended is unconstitutional. The futility and indignity of requiring such an oath is one thing, and objection on that score has been made and outvoted, but I believe the requirement of this oath violates the Bill of Rights.

There is no distinguishing the oath which the Taft-Hartley Act required of union officers. Indeed the oath recommended by the House of Delegates goes farther, for it requires a lawyer to state not only whether he is, but also whether he ever has been, a member of or affiliated with the Communist Party. Even if the oath were confined to the present, unless it is construed as strictly and narrowly as the Chief Justice and Justices Reed and Burton construed the oath required of union officers, all, instead of half, of the Justices who sat on the *Douds* case would have held it unconstitutional.

Nevertheless, the House of Delegates, with this decision and these opinions before it, recommended a substantially similar oath. One may say, of course, that the House impliedly adopted this narrow construction of the language they were using, but even then the Association finds itself in the position of recommending to the states something on whose constitutionality the Supreme Court of the United States was equally divided.

But the oath extends to past membership and past affiliations as well

as present, and so raises a constitutional question which I thought had been settled long ago in the *Garland* case after the Civil War. Though this decision was made over the dissent of four of the Justices, I cannot believe the Association expects that the opinion of the majority, delivered by Justice Field, will be overruled.

I think that the American Bar Association ought to show more respect for the Bill of Rights and be more sensitive to the liberties of lawyers. The Committee on the Bill of Rights, of which I am a member, and in which I have pressed this opinion, has refused to take any action. It seems to me that an association of lawyers should be better able to keep their heads than anyone else in times like these on questions like this. Like charity, constitutionality begins at home.

May I ask you to publish this letter.

CHARLES P. CURTIS

Boston, Massachusetts

Disapproves of Oath for Members of Bar

■ I have read your editorial in the February, 1951, issue of the AMERICAN BAR ASSOCIATION JOURNAL in support of the suggested lawyer's "loyalty oath". As a member of the Bar and of this Association, I am concerned about the attitude which is reflected in it.

Upon admission to the Bars of our respective states and of the federal courts, all of us have sworn in open court to uphold and defend the Constitution and the laws of the United States. To superimpose upon this oath the requirement of subscription to a vague and ambiguous test oath, is dangerous, futile and unnecessary. Without detailed discussion, suffice it to say that I am in full agreement with the reasoning set forth in the petition of the twenty-six dissenting members reprinted in the February issue of the JOURNAL.

Your editorial is even more disturbing than the resolution itself. I take specific exception to your statement that:

> Once the lawyer's oath has been suggested though, can it be said that it is unnecessary? . . . on the contrary, by opposing the oath we give good ground for the imputation that we are disloyal.

Intellectual independence is being threatened in the United States by a growing readiness to label as communistic *any* opposition to any invasion of fundamental rights if the suggestion is made in the name of "loyalty". A tendency toward hysteria may explain this reaction by the public-at-large, but it is shocking to see that it has found expression in the official organ of the profession whose purpose in society is so deeply grounded in objectivity of mind and fearless independence of expression. Such an attitude seems unworthy of the calling of Coke, Marshall and Holmes.

JAMES E. THOMAS

Atlanta, Georgia

What Incentive for Soldier?

■ On page 97 of the February issue, Kenneth S. Royall says:

> There must be a sufficient prospect of financial reward to supply the contractor with an incentive. . . .

What incentive do we offer the young man who is told to go out and kill and be killed in Korea or some other hell hole? Is the soldier not an American, even as the contractor? If patriotism, plus martial law "induces" the G. I. to kill and be killed, to live away from home, in dirt, in filth, in hunger, in cold and in constant terror, why can not the so-called contractor be similarly induced?

What kind of recommendation of our "way of life" is Royall's statement? In short, when do we emerge from the intellectual jungle?

LOUIS NECHO

Philadelphia, Pennsylvania

Answers Critic of Legal-Size Paper

■ Mr. Pellegrin's letter in the December, 1950, issue of the JOURNAL intrigues and alarms me.

I didn't know our profession existed for business. I always thought the legal profession existed for the individual. Naïvely, perhaps, I also thought business too existed for him.

If Mr. Pellegrin will request his lawyers so to do, I feel confident they will meet his wishes respecting the size paper upon which his copies of instruments drafted for him and his business concern are written. We should. But then we are used to meeting the convenience of others in the size paper we use. The various courts here (which are several) and the various governmental agencies (which are many) each have their special stationery requirements which we manage to meet without loss of efficiency or detriment to our dispositions. Even though our resulting files might not be as regimentally and precisionally exact as Mr. Pellegrin apparently deems necessary, at least they are mute testimony to the fact that they were brought into existence not by robots or the subjects of a welfare state, but by human beings possessed of intelligence, initiative and free will who lived in a community where it was still permissible, legally, economically and socially, to exercise those God-given gifts.

Many of my fellow-countrymen don't seem to realize that the gospel of "streamlining" and "efficiency", "mass-production" and "standardization" being so widely preached in this country today can, and if followed to its ultimate conclusion, of necessity will eventually turn this country into as truly and completely a totalitarian state as any presently existing.

ELIZABETH R. YOUNG

Washington, D. C.

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

▪ The West Virginia State Bar has established a Committee on Public Affairs to work with the legislature on measures affecting the improvement of the administration of justice and the legal profession. The committee takes no position on legislation involving strictly political questions. The result of the committee's first year of work has been commended by Senator Ralph J. Bean, Majority Leader in the Senate, as "rendering a valuable service to the lawyers as well as to the citizens of West Virginia". No bill which the committee studied and reported on unfavorably received approval by the legislature.

▪ The Kings County Criminal Bar Association adopted the following resolution in regard to loyalty oaths for lawyers:

> WHEREAS, the New York State Bar Association, The Association of the Bar of the City of New York, the New York Lawyers Guild, and the Massachusetts State Bar Association have wisely voted to oppose the proposed special Loyalty Oath for Lawyers, and
>
> WHEREAS, such loyalty oaths would unjustly and falsely cast a suspicion of disloyalty on the entire legal profession, and divert the attention of Bar Associations from a constructive program of making secure the Bill of Rights, into the blind and dirty alleys of snooping, rumor-mongering and witch hunting,
>
> RESOLVED, that the Kings County Criminal Bar Association affirms its opposition to any special loyalty tests for members or prospective members of the legal profession, and it opposes the adoption in this State of any legislation, canon of ethics or rule of court which would require lawyers, as a condition of their right to practice their profession, to subscribe to any additional loyalty oath or declaration other than the constitutional oath of office now required by Section 466 of the Judiciary Law.

▪ The Bar Association of the United States Court of Appeals, Seventh Circuit, which has as its general purpose "to foster and promote education in the history, theory, practice and administration of the law—particularly as applicable in the Federal Courts and Administrative Agencies of the Circuit" will hold its first annual meeting on June 14 and 15. The program for the meeting includes a series of seminars on practice in the District Court and the Court of Appeals. There will also be a report by Henry P. Chandler, Director of the Administrative Office of the United States Courts, and the presentation of a portrait of Mr. Justice Minton. Over two hundred of the approximately fifteen hundred lawyers admitted to practice in the Court of Appeals for the Seventh Circuit have become members of the Association.

George I. Haight is President of the Association, Kurt F. Pantzer, first Vice President, Casper W. Ooms, second Vice President, John F. Sembower, Secretary, and Frank J. McAdams, Jr., Treasurer.

▪ The Tuscarawas County [Ohio] Bar Association has been waging a vigorous campaign against unauthorized practitioners. Investigation revealed that in the field of deeds and mortgages at least 25 per cent were drawn by nonlawyers. Eleven suits were filed and pleas of guilty were entered in every case. Newspaper coverage of the campaign was excellent and favorable. The funds for the financing of the campaign were raised by older members of the Bar and the research and the major portion of the work was done by younger members, who were compensated for their services from the special fund. Fred Syler is President of the Association.

▪ The Detroit Bar Association has developed a program designed to be of assistance to younger members of the Bar. The program consists of a series of monthly symposiums at which the following subjects will be discussed: methods commonly used in interviewing witnesses, how to commence and prosecute a suit in Common Pleas Court, how to foreclose a mortgage, and methods of handling a claim before the Workmen's Compensation Commission.

▪ The Iowa State Bar Association has had great success with its legislative program. Near the close of the legislative session, nineteen of the Association's proposals had been passed and signed by the Governor. The bills included amendments of the Decedents' Estates Law, the authorization of the appointment of probation officers, The Uniform Photographic Evidence Law, and various acts bringing up to date legalizing acts, and bills for revision of the corporation laws. The President of the Association is T. M. Ingersoll, who will be succeeded in June by Ingalls Swisher.

▪ The Junior Bar Committee of the Michigan State Bar has started publication of a new magazine *Prospectus*. The publication will be distributed to all law students in the state. The first issue deals with the placement program of the Junior Bar Committee and its summer clerkship program. Another article deals with the work of lawyers in the state government and in the Armed Services.

The Loyalty Program

(Continued from page 437)

held by the Court of Appeals and the Supreme Court denied a petition for a writ of *certiorari* to review the case. *Friedman* v. *Schwellenbach,* 159 F. (2d) 22 (C.A.D.C.).

By means of Executive Order 9835 the President sought to establish certain standards and procedures for the exercise, in part, of his power to remove government administrative employees for disloyalty or to preclude the employment of persons on that ground. In order to apply the loyalty investigation program to approximately two million existing employees and to the applicants for Government employment who annually number about one-half million, the establishment of standards and the co-ordination of procedures are inevitably necessitated. The listing of subversive organizations by the Attorney General is an incident of the standards set up for checking the loyalty of the individual. The Supreme Court has ruled, albeit silently, that the procedure followed under Executive Order 9835 in refusing an individual Government employment on the grounds of disloyalty is not unconstitutional. At the same time the Supreme Court has ruled that an organization designated as "subversive" or "communist" by the Attorney General, pursuant to Executive Order 9835, is entitled to have its day in court once that organization instigates a judicial contest of the factual basis for its designation. The Attorney General, having failed before the highest court on the contention that the organization presents no justiciable controversy, has yet a wide opportunity to enter that contest anew and therein establish the propriety of the designation.

The several concurring opinions of the majority of the Court in the *Refugee Committee* case extended the issue to include the due process question, as it applied to an organization on the Attorney General's list, even though the Court was simultaneously affirming a lower court's judgment that the safeguards of due process need not be observed in barring an individual from government employment. Since the Attorney General's list of subversive organizations serves merely to implement the loyalty investigation of *individuals,* there is a *prima facie* indication that the Court is holding the right of the individual to be inferior to that of a designated group. It is true that in present circumstances the Court has granted judicial review for an organization on the Attorney General's list, while denying it to an individual whose discharge from government employment was based in large part upon her affiliation with such an organization. Mr. Justice Jackson said this result seemed to him "an inverted view of the law—it is justice turned bottomside up". Whatever comment may be directed at this aspect of the result does not detract from the fact that it nevertheless supports the main purpose of the loyalty investigation program.

With reference to the listing, as such, of subversive organizations by the Attorney General in support of the loyalty investigation program, Mr. Justice Jackson also made this observation:

> I agree that mere designation as subversive deprives the organizations themselves of no legal right or immunity. By it they are not dissolved, subjected to any legal prosecution, punished, penalized, or prohibited from carrying on any of their activities. Their claim of injury is that they cannot attract audiences, enlist members, or obtain contributions as readily as before. These, however, are sanctions applied by public disapproval, not by law. ...If the only effect of the Loyalty Order was that suffered by the organizations, I should think their right to relief very dubious.

Mr. Justice Jackson merely used this as a starting point, however, in his determination that the individual is the real target of the loyalty investigation procedure and that a hearing should be provided the organization in order that evidence as to its character may be presented to rebut the presumption of disloyalty against the Government employee who is a member of or affiliated with such organization. The dissenting minority of the Court, on the other hand, flatly stated that, "In our judgment organizations are not affected by these designations in such a manner as to permit a court's interference or to deny due process."

The views of the various members of the Supreme Court, as expressed in the several opinions rendered in the *Refugee Committee* case, are widely divergent. Despite the fact that the due process question has been widely explored in some of these opinions, it would be futile to attempt to forecast the Court's view of the *Refugee Committee* case should it again come before the high court after the Attorney General joins the issue, as he now has an opportunity to do, in the district court. *A fortiori,* it is folly to suggest that the present ruling of the Court demands abrogating the procedures now followed in the loyalty investigation procedures. Certainly we must protect and preserve our democratic principles, but we must also exercise every reasonable means to protect our democracy; the infiltration of our Government by those persons adhering to subversive designs raises such a threat to our internal security that every proper effort must be continued to find and remove or preclude such persons from government employment.

Some Argue That Loyalty List Should Be Withdrawn

Widely divergent views have been expressed with respect to the "requirements", if any, of the Supreme Court decision here discussed and the course of action which the Executive Branch of the Government should hereafter pursue. Since the very day on which the Supreme Court decision was handed down (and perhaps from even an earlier date) there are those who have strongly urged that the Attorney General should withdraw or cancel all his previous designations of organizations as "subversive", in whatever category, and institute some process of adminis-

trative hearings, possibly subject to judicial review, for the formulation of any new designations.

Some of these same persons, and perhaps others, have urged that the President should drastically amend his Executive Order so as to provide for elimination of the Attorney General's listing of organizations designated as "subversive", and to provide for individual administrative hearings in each "loyalty" case.

There have even been some who have counselled that the entire loyalty program should forthwith be abandoned, on the ground that the Supreme Court decision has branded the loyalty program as at least un-American if not actually illegal.

Since the writer of this article has already responded to a semiofficial request, directed to him more or less *"ex officio"*, for an expression of opinion with respect to this matter,[14] it is perhaps not inappropriate to append some comment here.

It is the writer's opinion that the Supreme Court has not "invalidated" the loyalty program, and will not "invalidate" it; and that instead of being either "illegal" or "un-American", the President's loyalty program represents a proper exercise by the Chief Executive of his powers, for the purpose of discharging his positive duty to protect the internal security of the United States.

Efforts to deter the Department of Justice from proceeding with trial of the pending case on its merits in the district court constitute the counsel of defeatism, entirely aside from the motive behind such efforts, which may well be one inimical to the best interests of the United States.

Editorial writers and columnists who allow themselves to be misled and in turn mislead others, perhaps in the rush of events and because they fail to comprehend fully the issues involved and the purport of the Court's decision, can plead unblushingly their own lack of comprehension as a defense. But for lawers, in a similar case, there is no such easy excuse.

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14. Under date of May 5, 1951, I addressed the following letter to the Honorable Hiram Bingham, Chairman of the Loyalty Review Board:

Dear Mr. Bingham:

You have asked me for an expression of my opinion with respect to the scope and import of the Supreme Court decision in the cases commonly referred to as Joint Anti-Fascist Refugee Committee, et al. v. McGrath et al., 19 U. S. Law Week 4232 (U. S. April 30, 1951).

The majority opinion, so called, only decides in the negative the issue "whether, in the face of the facts alleged in the complaints and *therefore admitted by the motion to dismiss*, the Attorney General of the United States has authority to include the complaining organizations in a list of organizations designated by him as Communist and furnished by him to the Loyalty Review Board of the United States Civil Service Commission".

The separate concurring opinions of Justices Black, Douglas, Frankfurter, and Jackson appear to extend the issue to include the due process question, and their opinions are principally directed at this question.

The minority opinion, written by Justice Reed, with the concurrence of the Chief Justice and Justice Minton, holds the due process question irrelevant.

This decision of the Supreme Court does not raise the requirement for notice and hearing prior to listing of an organization as "subversive" by the Attorney General. The Supreme Court ruling merely is that the cases be remanded with instructions to the district court to deny respondents' motion to dismiss the complaints for failure to state a claim upon which relief can be granted.

In plain layman's language, the Supreme Court has only sent the case back to be tried on the facts.

Clearly, the way still is open for the court to find that the Attorney General's listing of these organizations as "subversive" was justified on the facts and was neither arbitrary or capricious nor unreasonable in the light of the procedure actually followed. I can find in the various opinions in the Joint Anti-Fascist Refugee cases nothing to establish that the Supreme Court will refuse to approve such a finding. Indeed, until the case has been tried and the lower court has ruled, there is nothing further for the Supreme Court to consider.

Meanwhile, the Supreme Court's decision should not be interpreted as laying any duty upon the Loyalty Review Board. The Court has issued no mandate to the Loyalty Review Board either to perform any act or to refrain from performing any act. The Court has not invalidated any existing designation by the Attorney General of any organization as "subversive", and it appears to me that the Loyalty Review Board not only should properly continue to act on the assumption that all such designations by the Attorney General are valid, but actually there is no alternative to so acting.

In my opinion, this letter is not the place for expression of my personal opinion with respect to the merits of this controversy, particularly since the matter has been remanded for trial. Also, there appears no reason to express any opinion which might lend force to an unwarranted estimate of the true effect of this Supreme Court decision, which does not, per se, either undermine the listing procedure or create new or crippling requirements within the listing procedure.

Undoubtedly, there will be those who will exaggerate the import of this decision, perhaps even suggesting that the whole loyalty program should now be abandoned. Any such suggestion should be strongly resisted. Whatever the courts ultimately may decide, no change in the present loyalty review program is called for by the opinion just handed down.

Sincerely,
Pat McCarran

Freedom of the Press

(Continued from page 420)

objection of the representative of the United States, Carroll L. Binder, the distinguished editor of the *Minneapolis Star and Tribune*, this committee put the finishing touches on its proposed global treaty on information. This document, instead of freeing channels of information throughout the world, actually proposes to bottle them up and subject to punishment any who try to keep them open. I need but mention two of the proposals:

One would prohibit false or distorted reports that would undermine friendly relations between peoples and states.

The other would ban information likely to injure the feelings of nationals of a state.

If the latter of these had been in effect in 1933, not a word could have been printed in the American press regarding the policies of the Hitler government in Germany and the tyrannical methods used to enforce them. If this proposal should now become effective not a word could be published in American newspapers about the Stalin government in Russia, the Peron government in Argentina, the Mao government in China or the Franco government in Spain.

As for the first of the proposals, the ban on false or distorted reports, who is to decide what is false or what is distorted?

One of our great newspapers, heretofore sympathetic with the purpose of the United Nations, in discussing this proposal observed that

> If the power to decide what news is "false" and what news is "dis-

torted" were put in the hands of the government of any nation, the free press of that nation would cease to exist.

If this power is embraced in a treaty flowing from the United Nations, our free press will cease to exist.

Let me illustrate how it will be applied.

Only a few months ago the Spanish Embassy in Washington announced a new policy for the handling of applications of United States reporters seeking entry into Spain. Before being permitted to go to that country, the journalist who applies for a visa must produce from his publisher an agreement to print the Embassy's own "corrections of errors of fact" that might appear in his published articles. Further, such an applicant must submit all articles he has heretofore written on Spain, plus samples of other recently published articles, as well as a list of all newspapers or magazines which have ever published his articles and a list of all books he may have written.

Can you imagine the government of any American state requiring such a commitment from a newspaper man employed in a neighboring state? Or any city requiring it of a reporter from an adjacent city? Or the Congress of the United States requiring it of your newspapers' correspondents when they apply for admission to the Senate and House Press galleries?

If you can't, just bear in mind that the Government of Spain has already put into effect procedures wholly in accord with the intent and purpose of this newly drafted Treaty on Freedom of Information spewing from the United Nations.

Here in America our news gatherers are still free to come and go, to report what they learn, subject only to subsequent punishment if they libel someone or create a clear and present danger to the administration of justice.

Where other countries impose prior restraints upon the gathering and dissemination of information, America does not.

But how long we as citizens of the United States shall be privileged to have a free press depends upon us ourselves.

If we sit idly by and consent to the imposition of all the restrictions now being brewed in the United Nations, we shall not only lose our right to have a free press but all our other cherished liberties as well.

Aren't we sitting idly by?

The amazing thing about the American protest against the proposed Treaty on Freedom of Information is that no protest was made against the equally vicious articles in the Covenant on Human Rights. Even more amazing is the fact that the Covenant has the endorsement of our own State Department!

If eternal vigilance is the price of liberty, now is the time to be vigilant.

A survey of the historic battles fought by the press of this country demonstrates the vigilance with which newspapers have fought to preserve your right to impart and receive and discuss information.

In no one of these cases did the press stand to gain for itself by exposing rottenness, corruption, wrongdoing, or leniency in the treatment of law violators. What it did was to perform its function of disseminating information about matters of public importance and in so doing relied upon the constitutionally guaranteed right of the people to have a press free from official restraint in the performance of that function.

If it be argued that the press is guilty of abuses because of its freedom from prior restraint, the answer to that argument is found in Mr. Madison's Report on the Virginia Resolutions, wherein he said: [7]

> In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had "Sedition Acts," forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?

In 1907 the late Justice Harlan, in one of his notable dissents, said: [8]

> I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute the essential parts of every man's liberty. . . . It is . . . impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the nation or by the states, which does not embrace the right to enjoy free speech and the right to have a free press.

The proposed Covenant on Human Rights and the proposed Treaty on Freedom of Information represent the ultimate in hostile action against the right of the American people to enjoy free speech and to have a free press.

Freedom cannot be imposed upon a people. Only restraint can come about by imposition. We do not want that in America, however altruistic or fiendish may be the motives of those who espouse such restraint.

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7. Report on the Virginia Resolutions, 4 Madison's Works 544.
8. Patterson v. Colorado, 205 U.S. 454 (1907).

Congressional Resolutions

(Continued from page 424)

peal the law or condition the exercise of powers granted therein. This technique makes it possible for Congress to repeal the law or restrict the exercise of the powers delegated by a majority vote since the concurrence of the President in a concurrent resolution is unnecessary.[37] This was not always so. In 1919 and 1920 unsuccessful attempts were made to extend the scope of the concurrent resolution. In both Houses concurrent resolutions were introduced to end the state of war with Germany.[38] The war was eventually terminated in July, 1921, when the President approved a joint resolution. President Wilson's veto of the Budget and Accounting Bill because it provided that the Comptroller General might be removed by the concurrent resolution blocked another effort to enlarge the scope of the concurrent resolution.[39] President Roosevelt, under more favorable political circumstances, signed many important measures in which Congress reserved the right to nullify or terminate by concurrent resolution the exercise of powers therein granted.[40] For example in this connection, in World War II legislation, Congress has, in defining certain terms, *e.g.*, "termination of war", provided that it may by concurrent resolution terminate the war or otherwise limit the exercise of powers delegated.[41] However, in many of these instances the war was in fact terminated by a joint resolution passed by the Congress and approved by the President.[42]

The form of the resolution should not obscure its substance. This caution was sounded in 1921 by Representative James W. Good as follows:[43]

> ...There has never been that clear-cut distinction between a concurrent resolution and a joint resolution that there ought to be. My understanding of a concurrent resolution is that if it has the effect of law it must be signed by the President. The name offered to a resolution of this kind does not determine its status. We cannot pass a resolution that has the effect of law without the signature of the President of the United States. . . .

With the possible exception of the case mentioned in the preceding paragraph, the modern legislative practice has not incorporated propositions of legislation in concurrent resolutions.[44]

During the past forty years at least,[45] there have been very few congressional attempts, by concurrent resolution, to construe federal statutes. Only one instance has been found where both Houses of the Congress have passed a concurrent resolution designed to influence the judicial interpretation of its legislative acts. In 1945 the United States Court of Appeals for the Fifth Circuit,[46] cast some doubt upon the validity of certain administrative regulations of the Treasury Department. Following the court's decision, H. Con. Res. 50 was introduced in the 79th Congress with the object of clarifying the legislative purpose back of the various acts concerning deductions for intangible drilling and development costs in the case of oil and gas wells. As agreed to by the Senate on July 21, 1945, the resolution read:

> *Resolved by the House of Representatives (the Senate concurring)*, That in the public interest the Congress hereby declares that by the reenactment, in the various revenue acts beginning with the Revenue Act of 1918, of the provisions of section 23 of the Internal Revenue Code and of the corresponding sections of prior revenue acts allowing a deduction for ordinary and necessary business expenses, and by the enactment of the provisions of section 711 (b) (1) of the Internal Revenue Code relating to the deduction for intangible drilling and development costs in the case of oil and gas wells, the Congress has recognized and approved the provisions of section 29.23 (M)–16 of Treasury Regulations 111 and the corresponding provisions of prior Treasury regulations granting the option to deduct as expenses such intangible drilling and development costs.

The resolution was urged upon the court as requiring reconsideration of its decision in the case of *F. H. E. Oil Co.* v. *Commissioner of Internal Revenue*.[47] The court, in a *per curiam* opinion, said on this issue:

> Resolution No. 50 adopted by the House of Representatives June 22, and agreed to by the Senate July 21, 1945, is urged as requiring a reconsideration. The Resolution is not an Act of Congress approved by the President or passed over his veto. It does not make law, or change the law made by a previous Congress and President. It does not alter the statutes as they existed when the taxes in controversy accrued. As an expression of opinion on a point of law it would of course be entitled to most respectful consideration by the courts, which under the Constitution exercise the judicial power, that is, the power to decide cases. We do not think the Resolution was intended as an intrusion upon the judicial power, but only as an assurance to those engaged in the oil and gas well business that the special favor heretofore extended them by the "expense option" of the Treasury Regulation which the Treasury Department had declared its purpose to continue, had the backing of those voting for the Resolution. It was not its purpose to enlarge or extend the Regulation beyond the understanding and practice of the Treasury Department which had made and administered the Regulation. . . .

Since 1907 at least one concurrent resolution has been introduced in the Congress for the purpose of influenc-

37. Whether this use of the concurrent resolution is constitutional is not within the scope of this article. The issue has been raised by some authorities.

38. White, *supra*, 886.

39. Cong. Rec., 66th Cong., 2d Sess., page 8609 (June 4, 1920).

40. See, e. g. §5, Reorganization Act of 1939, 53 Stat. 563 (1939), 5 U. S. C. §133d (1946); §1 (a), Neutrality Act of 1939, 54 Stat. 4 (1939), 22 U. S. C. §245a (1946); §3-c, Lend-Lease Act of 1941, 55 Stat. 31 (1941), 22 U. S. C. §412 (1946).

41. See, e. g. §1502, Servicemen's Readjustment Act of 1944, 58 Stat. 301 (1944), 38 U. S. C. §697b (1946).

42. See, e. g. S. J. Res. 123, 80th Cong., which became Public Law 239, 80th Cong., July 25, 1947, 61 Stat. 451 (1947).

43. Cong. Rec., 67th Cong., 1st Sess., page 1855 (May 27, 1921). Clearly, Congressman Good did not intend to cover the case where a law is enacted over the veto of the President.

44. 4 *Hind's Precedents*, §3484.

45. The writer makes this statement after having reviewed the titles of all concurrent resolutions introduced in the Congress since December 2, 1907, the beginning of the 60th Congress. Where the title indicated a possibility that the resolution was introduced for the purpose of influencing the interpretation of a federal law the resolution was read.

46. *F. H. E. Oil Co.* v. *Commissioner of Internal Revenue*, 147 F. (2d) 1002 (1945); same, 149 F. (2d) 238 (1945).

47. Cited *supra*, note 30.

ing the construction of a previously enacted statute. The Tariff Act of 1922[48] provided for the collection of duties on imports according to the terms of schedules incorporated in the Act. Paragraph 727 of Schedule 7 (dealing with agricultural products and provisions) falling under Section 1, Title I, of the Act provided for a duty of one-half of one cent per pound on "broken rice, and rice meal, flour, polish, and bran". On December 19, 1927, Senator Ransdell introduced S. Con. Res. 4, which provided:

> *Resolved by the Senate (the House of Representatives concurring)*, That for the purpose of interpreting the meaning of the tariff act of 1922, with respect to imported broken rice, "broken rice" shall include only the class "Brewers' milled rice" as specified in the united standards for milled rice.

The committee reported it out on January 9, 1928, and, with a clarifying amendment, it passed the Senate without debate on January 12, 1928. The House of Representatives after considering the effect of the concurrent resolution returned it to the Senate without its concurrence on January 16, 1928, by passage of H. Res. 92. The reasons for the failure of the House to concur in the concurrent resolution were well stated in Resolution No. 92 as follows:

> *Resolved*, That Senate Concurrent Resolution 4 in the opinion of this House contravenes the first clause of the seventh section of the first article of the Constitution of the United States, and is an infringement of the privileges of this House, and that the said resolution be respectfully returned to the Senate with a message communicating this resolution.

From time to time Congress has utilized both the simple and the joint resolution as a vehicle for influencing the interpretation of previously enacted laws. Although an exhaustive search for precedent, usage and decision regarding these types of resolutions has not been made, the rules governing their use as an aid in statutory interpretation appears to be well established. The passage of a simple resolution by either House, construing a previously enacted general law, is not obligatory upon the executive or the judiciary.[49] The meaning of a treaty executed by the President and ratified by the Senate can not be controlled by a Senate simple resolution purporting to set forth the Senate's real intention in ratifying the treaty.[50] Such simple resolutions are only declaratory of the opinion of the Senate or the House of Representatives on the question involved.

Effect of Interpretive Joint Resolution Is Not Always the Same

The effect of the passage of a joint resolution with the approval of the President for the purpose of placing a legislative interpretation upon the basic law is not always the same. The time factor seems to be significant in determining the effect to be given such joint resolutions. For example, if the resolution is passed a considerable period of time after the enactment of the laws being construed, then it is of little or no value in interpreting those laws.[51] If, however, the joint resolution clarifying the legislative intent is passed contemporaneously with the basic act now being interpreted they must be construed together.[52]

Although primarily concerned with the federal practice relative to concurrent resolutions, since no federal case directly in point has been discovered, the state practice in analogous cases may be persuasive. The Michigan court,[53] faced with situations similar to that presented by S. Con. Res. 107, held that although entitled to respectful consideration the concurrent resolution of the legislature as to the proper construction of the previously enacted law was not binding upon the courts. Moreover, the court indicated that it believed the legislature should have expressed its intention clearly in the first instance or later by amendment rather than by a subsequently passed concurrent resolution. New York[54] has held that a concurrent resolution passed by the legislature is ineffective to modify or repeal a previously enacted statute. In the court's opinion "a concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body" and resembles a statute "neither in the mode of passage nor in its consequences". The California court,[55] in a decision rendered near the turn of the nineteenth century, declared that a concurrent resolution of the legislature to which the executive approval is not affixed, although passed upon the Governor's recommendation, is not an "express authority of law" within the meaning of the state constitution. The Ohio court,[56] in a case where the legislature by concurrent resolution sought to ratify a deed theretofore executed by the Governor, held that the resolution was not an act of legislation and that it could not be effective for any purpose for which an exercise of legislative power is necessary.

Essentially the potential problem which would have been presented by the passage of S. Con. Res. 107 is one of statutory construction. There is also raised the question of legislative authentic interpretations by which the legislature declares the true meaning of the law for the guidance of the courts.[57]

The cardinal rule in interpreting or applying a statute is to seek the

48. 42 Stat. 858 (1922).

49. 6 Op. Atty. Gen. 680 (1854); 19 Op. Atty. Gen. 385 (1889).

50. *Fourteen Diamond Rings, Emil J. Pepke, Claimant v. United States* (The Diamond Rings), *supra* note 12.

51. *United States v. Salberg*, 287 Fed. 208 (D.C. N.D. Ohio, 1923).

52. *Bigelow v. Forrest*, 9 Wall. 339, 19 L. ed. 696 (1869).

53. *Becker v. Detroit Savings Bank*, *supra* note 30; *Boyer-Campbell Co. v. Fry*, *supra* note 30.

54. *Moran v. La Guardia*, *supra* note 30. See 22 Cornell L. Q. 90 (1936) for a note criticizing the majority for refusing to give effect to the resolution.

55. *Mullan v. State of California*, *supra* note 30.

56. *Cleveland Terminal & V. R. Co. v. State*, cited *supra* note 30.

57. A discussion of the relative merits of legislative interpretation is not within the scope of this paper. It is sufficient to point out that the universal recognition of the independence of the judiciary as essential to government by law condemns the practice of authentic legislative interpretation. On this matter see Freund, *Legislative Regulation* (1932) 178.

intention of the legislature in passing the statute.[58] The object of the rule is to ascertain the meaning and intention of the legislature to the end that the same may be enforced. "What is the legislative intention characterizing any particular enactment is largely a matter of fact to be determined from evidentiary rules and circumstances".[59] Further, it is recognized that even where the statutory language is clear, consideration of persuasive evidence of legislative intention is not precluded.[60]

It is assumed that in nearly every case similar to that before us the meaning of the language of the statute in question is ambiguous,[61] otherwise there would be no necessity for the introduction and passage of a resolution of any type to clarify the legislative intention. In the case of Public Law 610 this assumption of the existence of ambiguity is borne out both by the fact that S. Con. Res. 107 was introduced and passed the Senate and by the decision of the Administrator of Veterans' Affairs interpreting the Act.[62]

Once ambiguity of meaning in the language of legislation is demonstrated, the interpreter has available numerous aids to help him determine the true intention of the legislature in enacting the law. Which of these many aids he will choose depends somewhat upon his approach to the problem. It should be noted here that today "canons of construction and judicial precedents limiting the use of extrinsic aids are, fortunately, regarded as only persuasive".[63] The modern trend is toward utilization of all the available intrinsic and extrinsic aids.[64]

58. *United States* v. *N. E. Rosenblum Truck Lines*, 315 U. S. 50, 53, 62 S. Ct. 445, 86 L. ed. 671, 675 (1941); *United States* v. *Cooper Corp.*, 312 U. S. 600, 614, 61 S. Ct. 742, 85 L. ed. 1071, 1080 (1940); *Wisconsin Central R. Co.* v. *Forsythe*, 159 U. S. 46, 55, 15 S. Ct. 1020, 40 L. ed. 71, 74 (1894); 50 Am. Jur., Statutes, §223.

59. *Madison* v. *Southern Wisconsin R. Co.*, 156 Wis. 352, 146 N. W. 492, 495 (1914). Sutherland, *op. cit. supra* §4302, says:

. . . Courts should not lose sight of the fact that statutory interpretation, whatever it may be called so far as the function of courts and juries is concerned, is a fact issue. Where available, the courts should never exclude relevant evidence on that issue of fact.

60. In *Boston Sand & Gravel Co.* v. *United States*, 278 U. S. 41, 48, 49 S. Ct. 52, 73 L. ed. 170, 177 (1928), Justice Holmes declared:

. . . It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute . . . .

See also Comments on Recent Decisions relating to the use of legislative history in aid of interpretation, 29 Geo. L. J. 256 (1940).

61. Justice Frankfurter in his dissent to *United States* v. *Monia*, 317 U. S. 424, 431, 63 S. Ct. 409, 87 L. ed. 376, 382 (1942), remarked:

. . . The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. . . . A statute, like other living organisms, derives significance and sustenance from its environment, from which it can not be severed without being mutilated. Especially is this true where the statute, . . . is part of a legislative process having a history and a purpose. The meaning of such a statute can not be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning. . . .

62. In Administrator's Decision, Veterans' Administration, No. 858, September 21, 1950, legislative history is used liberally in order to arrive at the meaning of the provisions of Section 2 of Public Law 610, 81st Congress, July 13, 1950.

63. De Sloovère, "Extrinsic Aids in the Interpretation of Statutes", 88 *U. of Pa. L. Rev.* 527, 528 (1940).

64. See, e. g., *Social Security Board* v. *Nierotko*, 327 U. S. 358, 66 S. Ct. 637, 90 L. ed. 718 (1946); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. ed. 1230 (1946) and 154 F. (2d) 785 (C.C.A. 2d, 1946); *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 60 S. Ct. 1059, 84 L. ed. 1345 (1940); *Keifer & Keifer* v. *RFC*, 306 U. S. 381, 59 S. Ct. 516, 83 L. ed. 784 (1939); *Boston Sand & Gravel Co.* v. *United States*, *supra* note 60.

In *United States* v. *Dickerson*, 310 U. S. 554, 562, 60 S. Ct. 1034, 84 L. ed. 1356, 1362 (1940), *rehearing denied* 311 U. S. 724, 61 S. Ct. 53, 85 L. ed. 472, it was said:

. . . It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the

Among the intrinsic and extrinsic aids commonly used are the words and their context, statutes in *pari materia*, the common law, contemporary opinion and conditions and legislative history. As far as the use of legislative history is concerned, the federal courts have adopted a liberal view as to what items of history are admissible to show the intention of the Congress in enacting the measure.[65]

Logically the events occurring immediately prior to the enactment afford the most lucrative source of information indicative of the legislative intention. Consequently history of the measure from the time of its introduction in the Congress to its enactment has generally been the first extrinsic aid utilized.[66] This history has included, among other things, committee reports,[67] certain statements made at committee hearings[68] and by the member of the committee in charge of the bill "on the floor",[69] and messages of the President.[70] It will be observed that in timing, these events occurred before the enactment date of the legislation being interpreted. When expressions of legislative intention are made subsequent to the enactment date, however, an altogether different question is presented.[71]

The question immediately arising is should this concurrent resolution be admissible to prove the intention of the Congress at the time of enacting the legislation being interpreted? Basically, this is a matter of assessing the probative value of the resolution for the purpose of indicating the legislative intention at the time of the enactment of the statute. In assessing the probative value of S. Con. Res. 107, or any other such resolution under similar circumstances, a number of factors must be considered.

From the standpoint of logic and experience, would the passage of a concurrent resolution, *e. g.*, No. 107, be a clarifying expression of the intention of the Congress at the time of enacting the law? Or would its passage merely be an afterthought made to rectify a failure to consider and determine the issue on first consideration? Should there be any hesitancy in permitting the later expression of intention to establish the intention in fact existing at the time Public Law 610 was passed? How reliable is such evidence?

It can be argued, of course, that S. Con. Res. 107 was in fact contemporaneous with the enactment of Public Law 610 for it was introduced and passed the Senate within sixty days after the enactment of the law. And that it would have passed the House of Representatives within a very few days but for the recess taken by the Congress soon after it was referred to the House. Further, the membership of the committee and of the Congress was the same as it was on July 13, 1950. Moreover, it could be contended that the language of the resolution, and the committee report was clearly consistent with and truly explanatory of the language used in the Act. It also might be argued that such a resolution is, at least, on a par with committee reports and legislative journals.[72] On the other hand there are considerations mentioned in the preceding paragraph as well as a question of the validity of the policy which would be created by accepting this type of evidence.[73]

One View Would Ignore Role of President

It is well established that the action of the President in approving a measure or in returning a measure to Congress with the reason for his disapproval is part of the legislative process under the Constitution.[74] When the President signs bills presented to him for approval he performs a legislative function rather than an executive function.[75] The acceptance of such a concurrent resolution would appear to fail to give due consideration to the role played by the President in approving the statute. Moreover, to accept such a resolution as proof of the legislative

customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. . . . The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction. . . .

Also see Fisher and Harbison, "Trends in the Use of Extrinsic Aids in Statutory Interpretation, 3 *Vand L. Rev.* 586 (1950).

65. See Jones, "Extrinsic Aids in the Federal Courts", 25 *Iowa L. Rev.* 736 (1940).

66. Sutherland, *op. cit. supra* §5003. Also see Jackson, "The Meaning of Statutes: What Congress Says or What the Court Says", 34 *A. B. A. J.* 535, 537 (1948), where the Justice expresses the view that legislative history is of dubious help to true interpretation and as a practice presents serious practical problems for a large part of the legal profession.

67. *United States* v. *American Trucking Ass'ns.*, *supra* note 64; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349 (1921); *New York Central R. Co.* v. *Winfield*, 244 U. S. 147, 37 S. Ct. 546, 61 L. ed. 1045 (1917); *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226 (1892); Sutherland, *op. cit. supra* §5005.

68. *O'Hara* v. *Luckenback Steamship Co.*, 269 U. S. 364, 46 S. Ct. 157, 70 L. ed. 313 (1926); *Stafford* v. *Wallace*, 258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 735 (1922); *Church of the Holy Trinity* v. *United States*, *supra* note 67; *Coke* v. *Illinois Central R. Co.*, 255 Fed. 190 (D.C. W.D. Tenn., 1919); Sutherland, *op. cit. supra* §5009.

69. *United States* v. *Dickerson* and *United States* v. *American Trucking Ass'ns.*, both cited *supra*, note 64; *United States* v. *City and County of San Francisco*, 310 U. S. 16, 60 S. Ct. 749, 84 L. ed. 1050 (1940); *United Electric Coal Companies* v. *Rice*, 80 F. (2d) 1 (1935); *Coke* v. *Illinois Central R. Co.*, *supra* note 68; Sutherland *op. cit. supra* §§5011-12.

70. *New York Central R. Co.* v. *Winfield*, *supra* note 67; *Johnson* v. *Southern Pac. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363 (1904); *Coke* v. *Illinois Central R. Co.*, *supra* note 68; Sutherland, *op. cit. supra* §5004.

71. See comment on *People ex rel. Barrett* v. *Anderson*, 398 Ill. 480, 76 N. E. (2d) 773 (1947), in 15 *U. Chi. L. Rev.* 984 (1948) where the view is expressed that a concurrent resolution of the legislature adopted eight days after the legislature adopted the Act and one day before the Governor signed it is competent evidence of the legislative intent. It is said there that—

. . . Even though a joint [concurrent] resolution may not have the formality of an amendment, a resolution expressly passed to clarify a statute as originally enacted can hardly be ignored by a court willing to recognize where the express legislative power of the community is vested. Certainly the joint [concurrent] resolution is at least on a par with committee reports and legislative journals.

It should be noted that the court did not once mention the resolution of the legislature in interpreting the Act of the legislature.

72. See footnote 71 *supra*.

73. See Sparkman, "Legislative History and the Interpretation of Laws", 2 *Ala. L. Rev.* 189, 194 (1950), where the Senator argues that he "can think of situations where actions taken after enactment of the statute in an attempt to clarify the intent of Congress in its passage might have some relevance and might profitably be admitted, leaving to the discretion of the court the weight to be assigned to them".

74. Art. I, §7, United States Const.

75. Sutherland, *op. cit. supra* §225; 59 C. J. 101.

intention would, in the absence of the assent of the President, enable the Congress, in some cases at least, to do indirectly that which it could not do directly. Should the Congress seek to amend the law by bill or joint resolution and the President were to return the measure without his approval it would require the vote of two-thirds of each of the two Houses to override the veto and thereby effectuate the amendment of the law.[76] The adoption of a concurrent resolution, however, is possible by a mere majority vote of each House.

If a concurrent resolution construing the law were accepted as persuasive, where could the line be drawn? Would a declaratory resolution of one House suffice? Or must there be several successive resolutions, cumulative one upon the other? What would be done if opposing resolutions were passed by the two Houses? The answer to these questions seems clear. The most that can be said was pointed out by Attorney General Cushing in 1854 when he wrote these words:[77]

> A mere vote of either or both Houses of Congress, declaring its opinion of the proper construction of a general law has, be it repeated, in itself, no constitutional force or obligation as law. It is opinion merely, and to be dealt with as such, receiving more or less deference, like other mere opinions, according to the circumstances. . . .

Acceptance of S. Con. Res. 107, if it had been passed by the House of Representatives, as valid evidence of the legislative intention existing at the time of the enactment of Public Law 610 would necessitate giving it a retroactive effect upon rights acquired under contracts entered into between July 13, 1950, and the date of its passage. This retroactive effect upon contract rights vested under the law as already construed might present a constitutional question, which will not be explored here.

It appears clear from what has been said that concurrent resolutions of Congress do not have the effect of law unless they have been approved by the President. Generally in the modern legislative practice concurrent resolutions do not contain propositions of legislation, such as to require the approval of the President. If S. Con. Res. 107 had been passed, it would in all probability not have been presented to the President for his approval. Consequently, it would not be law. It, therefore, could not have had the legal effect of amending Public Law 610.

While the question of what evidentiary value should be assigned to a typical concurrent resolution passed after the enactment of the law being interpreted has not been decided by the federal courts, the reasons against acceptance of such evidence of legislative intention are strong. Morover, the only state court[78] that has had this specific problem before it has refused to be bound by the attempt at legislative construction. While as a general proposition courts should not ignore legislative interpretation of a statute, yet such interpretation is immaterial in the sense that the courts alone may finally declare the meaning of the statute.[79] Fundamentally, the determination of the true meaning of existing law is a judicial rather than a legislative function. The courts have refused in some cases even to be bound by joint resolutions duly passed by the legislature. A subsequently passed concurrent resolution should not be accepted as persuasive evidence of the legislative intent in fact existing at the time of the enactment of a public law.[80]

76. Cited *supra*, note 74.

77. 6 *Op. Atty. Gen.* 694 (1854).

78. *Boyer-Campbell Co.* v. *Fry*, and *Becker* v. *Detroit Savings Bank*, both cited *supra* note 30.

79. *American Exchange & Securities Corp.* v. *Helvering*, 74 F. (2d) 213 (C.C.A. 2d, 1934). Professor Freund, *op. cit. supra*, page 178, declared that the "real and permanent objection to authentic legislative interpretation is that interpretation is an incident to the application of the law, and that the judicial application of the laws should be independent".

80. Those interested in the merits of the statutory problem, which was posed by S. Con. Res. 107, are referred to Administrator's Decision, Veterans' Administration, No. 858, September 21, 1950, to Senate Report No. 2558, 81st Cong., 2d Sess., and to House Committee on Veterans' Affairs Print No. 342, 81st Cong., 2d Sess.

The views of the Veterans' Administration relative to the effect which it should give to S. Con. Res. 107, if it were passed, are contained in the report of the Administrator of Veterans' Affairs to the Chairman, Committee on Veterans' Affairs, (House Committee Print No. 342, 81st Cong., 2d Sess.). The Administrator said therein on this score:

> The concurrent resolution is designed to declare the sense of the Congress with respect to the meaning and application of certain provisions of Public Law 610, 81st Congress, approved July 13, 1950, relating to tuition and other charges by institutions furnishing education and training under the Servicemen's Readjustment Act. The resolution, both in form and substance, would not purport to amend or modify the terms of the law itself and though entitled to respectful consideration it would not have the effect of supplying a meaning to that law which is inconsistent with its express provisions.

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